THE

ERNMENT OF GREATER BRITAIN

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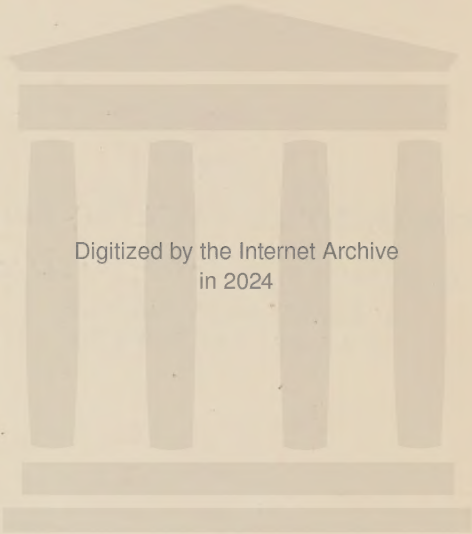

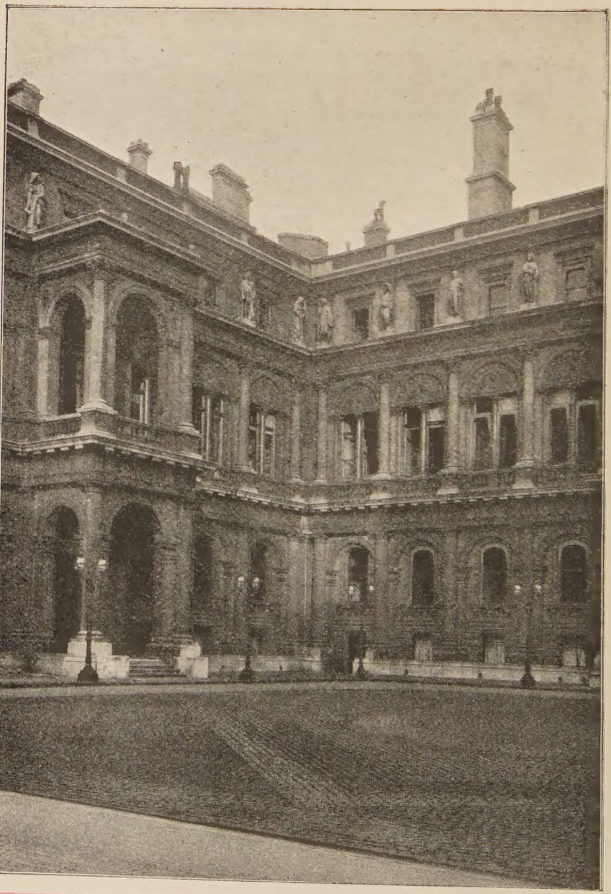

THE COLONIAL OFFICE

THE GOVERNMENT OF GREATER BRITAIN

BY WILLIAM F. TROTTER

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PREFACE

On 5th November, 1901, a Royal Proclamation was issued, announcing that the King had availed himself of the provisions of the Royal Titles Act[1] of that year. That Act empowered the King "to make such addition to the style and titles at present appertaining to the Imperial Crown of the United Kingdom and its dependencies" as he might think fit, "with a view to the recognition of His Majesty's dominions beyond the seas."[2] After the words "of the United Kingdom of Great Britain and Ireland" in the description of the Royal Titles, there now follow the words "and of the British Dominions beyond the Seas."

This primer is an attempt to give a brief account of how "the British Dominions beyond the Seas" are actually governed. Beginning with a short analysis of the meaning of a "British Dominion," it proceeds to survey the general relations existing in law and custom between the United Kingdom and its possessions. Then, after classifying the various British dominions, it deals with the constitutional structure and government of each class, singling out the more important possessions, such as the Commonwealth of Australia, the Dominion of Canada, and British India, for a more detailed examination.

There is nothing more difficult in the discussion of a subject than to combine accuracy and conciseness with a popular treatment. But the topic of these pages is so important, that the task was worth trying. At no time more than the present

[1] 1 Edw. VII. c. 15. [2] *Ibid.* sec. 1.

has it been the duty of every citizen to acquire a knowledge of the constitution of Greater Britain; for great changes are being proposed in such constitution. Again, our colonial constitutions, especially the Australasian, afford us interesting examples of adaptations of the British constitution worked out on more democratic lines. From them valuable lessons may be gathered by the politician.

The writer's indebtedness to the works of eminent writers on different branches of the subject will be apparent from a perusal of these pages. These are too numerous for mention here, but will be found in the brief list of authorities at the end of the book. The author has of course investigated the independent and original sources of information in imperial and colonial statutes, Orders in Council, ordinances, case law, and the like. In this connection he is indebted to the courteous Colonial Office Librarian for affording him access to documents which were otherwise practically inaccessible.

It has been difficult to keep up with the rapid constitutional changes in the colonies. Even since the book went to press, the Australian States have agreed to make their franchise uniform with that of the Commonwealth. British East Africa, British Central Africa and Uganda will next month be transferred to the control of the Colonial Office. The Transvaal is to receive a representative constitution by Letters Patent.

EDINBURGH, *March* 1905.

PRINCIPAL ABBREVIATIONS

S.C.R. = Reports of the Supreme Court of Canada.

V.L.R. = Reports of the Supreme Court of Victoria.

The other abbreviations in the footnotes are those used in the English Law Reports and text books.

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CHAPTER I

The Meaning of Greater Britain

Greater Britain. The term "Greater Britain" may be said to be employed in two different senses, a *political* and a *popular*, and to these may be added the one in which it is here used. Though these three different meanings of the term include much in common, they differ in the extent of territory to which they apply. By political writers, such as Sir Charles Dilke[1] and Freeman, the expression "Greater Britain" is applied to all countries of English speech or English government, and thus includes the United States of America. Popularly it is confined to countries which are either completely or more or less incompletely under the control of Britain. This application of the term is obviously much less extensive than the first. It would exclude the United States of America. In the sense in which it is here employed, the term "Greater Britain" includes all British *possessions* outside of the United Kingdom. This is a still narrower application of the term; for although the expression

[1] *Problems of Greater Britain*, pp. 101–2. In his *Expansion of England* the late Professor Seeley employs the term in practically the same sense given to it in this book, although he does not include under it the Channel Islands and the Isle of Man.

is not in popular usage applied to the Channel Islands and the Isle of Man, as it is here, it is apparently so applied to what are really British protectorates and spheres of influence. The average man would probably regard British Central Africa as part of the British dominions. But this is not the case from the legal point of view, as British Central Africa is, technically speaking, a protectorate. Much less can a British sphere of influence be included among British possessions. For the fuller explanation of what is here understood as Greater Britain, it is thus necessary to know precisely in what respects a *possession* or *dominion* differs from a *protectorate* and a *sphere of influence*.

Protectorates. The external sovereignty of a state must be distinguished from its internal sovereignty. External sovereignty has been defined to be the independence of one political society or state in respect to all other political societies or states, that is to say, its complete freedom to make peace or war, or enter into treaty or diplomatic relations with other states. In short, it is the right of a state to manage its own foreign affairs. Internal sovereignty is the right of a state to manage its own internal or home affairs in its own way. It is the authority possessed by a state over its own subjects and property, and is exemplified in its civil and criminal legislation.[1] A state may possess internal sovereignty, although it does not possess external sovereignty. It may have the right to manage its home affairs, and not the right to manage its foreign affairs. Prior to the late Boer war the Transvaal Republic could not, after 1884, conclude any treaties with foreign powers, except the Orange Free State, without the consent of the British Government. But it had, apart from any stipulations in the treaty of 1884, full right to manage its own internal affairs. Most, but not *all*, of its powers of external sovereignty were vested in Great Britain. When *all* the powers of external sovereignty of one state are vested in another state, the first state

[1] See Hall, *International Law* (4th ed.), pp. 50, 51.

is called a *protectorate*, and the second state is the *protecting* state. These names are given, because the protecting state undertakes to protect the inhabitants of the country, whose relations with other countries it thus controls, from interference by any foreign power. Most generally it happens that the protecting state interferes more or less in the internal affairs of the protected state. This follows almost of necessity; for most protectorates of any importance have, during the last forty years, been uncivilized, or at any rate non-Christian states. If the protecting state assumes complete control over the internal affairs of its protectorate, the latter state ceases to be a protectorate, and becomes a *dominion* or *possession* of the protecting state. What constitutes complete control is not easily determined, and in particular instances it is hard to draw the line between a protectorate and a dominion or possession.

Two kinds of British Protectorates. The late Sir Henry Jenkyns, an eminent authority on the subject, distinguishes two main types of British protectorates: "one where there is an organized government under a sovereign, with more or less distinct boundaries; the other where there is no organized government over the whole of the territory, but where a petty chief governs his own tribe, or sometimes a combination of several tribes, or where there is even still less civilization and merely tribes, perhaps nomad."[1] In the former "hardly any of the internal sovereignty is assumed directly;"[2] the natives enjoy their own law, hold their own courts, and administer their own affairs. A British Resident, however, lives in the country to give advice on government and to maintain internal peace. In the second class of protectorates the amount of internal sovereignty assumed by Britain varies greatly, ranging from almost complete control in internal matters to an infinitesimal amount of such control. Thus British Central

[1] *British Rule and Jurisdiction beyond the Seas*, p. 172.
[2] *Ibid.* p. 174.

Africa, East Africa, and Uganda are each governed by a British officer, called a Commissioner and Consul-General. He has very wide legislative and administrative powers, which are exercised by him subject to directions from the Secretary of State for Foreign Affairs. British courts are also established to administer justice therein, and these protectorates are barely distinguishable from Crown colonies.[1] Indeed it may be noted that it is proposed to transfer next year (1905) the British East Africa and Uganda protectorates from the control of the Foreign Office to that of the Colonial Office.[2] On the other hand the British Government has not interfered at all in the internal government of the protectorate of the Somali coast; although a change may be imminent, the general tendency being in all cases to assume more and more power of internal control, until a protectorate becomes in fact a British dominion or possession.

Spheres of Influence. Just as it is difficult in particular cases to draw the line between a *protectorate* and a *possession* or *dominion* of the mother country, so is it difficult to distinguish in particular instances between *spheres of influence* and *protectorates*. A *sphere of influence* may be described as a territory over which a given state exercises no direct control either in internal or in external affairs, but over which it claims that no other state shall acquire dominion or establish a protectorate.[3] Spheres of influence are the subject of treaty stipulations. Thus in July 1890, Great Britain made a treaty with Germany for the delimitation of their respective spheres of influence in East Africa and South-west Africa. A treaty to the same effect, but relating to South Africa, was entered into by Great Britain and Portugal in August of the same year. But a sphere of

[1] For the meaning of a Crown colony, see p. 32 below.

[2] See *The Times* of June 8, 1904. The fact, however, that a country is administered by the Colonial Office does not necessarily mean that it is a British dominion. Cyprus is not a British possession, and yet it is administered by the Colonial Office.

[3] Hall, *International Law* (4th ed.), p. 134.

influence quickly tends to develop into a protectorate. Spheres of influence are only established in uncivilized countries, and states, possessing such, find themselves sooner or later compelled to take measures for the protection of settlers in them, such as missionaries and traders. The tribes within these spheres of influence have to be prevented from fighting outside tribes or among themselves, and have to be protected from external attack. A form of a more or less organized protectorate grows up, which in turn develops into a dominion held in full possession by the mother country. So we get this evolution: Sphere of influence—Protectorate —Colony or Possession.

Chartered Companies. Sometimes, instead of the Home Government itself undertaking the development of a sphere of influence into a protectorate, it leaves that work to be done by a Chartered Company. Thus in 1886 the Royal Niger Company received a Crown Charter which empowered it to settle, trade, and govern within the British sphere of influence in and about the Niger Coast and Hinterland. It reduced a large territory into an orderly administration, and established trade. In 1899 the Home Government took over its powers of government, and established the protectorates of Northern and Southern Nigeria. The British South Africa Company is another example of a chartered company doing the same kind of work, supervised by the High Commissioner for South Africa.

Divisions of Greater Britain. We have now distinguished British *spheres of influence* and British *protectorates* from *dominions* or *possessions* over which Great Britain exercises full control both in internal and external affairs, and in which it claims the land and water by legal title. Such possessions fall to be divided into two classes owing to the legal definitions of the terms "colony" and "possession." A British possession is defined by the Interpretation Act of 1889,[1] section 18, sub-section 2, as being any part of His

[1] 52 & 53 Vict. c. 63.

Majesty's dominions outside of the United Kingdom, which forms a separate community. According to sub-section 3 of the same section of that Act, the term "colony" means any part of the British dominions exclusive of the British Islands and of British India, and according to sub-section 1 the British Islands include the United Kingdom, the Channel Islands, and the Isle of Man. We thus get a geographical division of British possessions outside of the United Kingdom, or, in other words, of Greater Britain, into two main classes:—

I. Colonies.
II. Possessions which are not Colonies, namely, the Channel Islands, the Isle of Man, and British India.

When we come to deal with the colonies, we shall find that they are capable of sub-division. But before proceeding to examine each class in detail, it is necessary to consider the general constitutional relations between the mother country and her possessions.

CHAPTER II

The General Constitutional Relations between the United Kingdom and Greater Britain

The constitutional relation of the United Kingdom to Greater Britain is one of *supremacy*. This supremacy is of three kinds, corresponding to the three departments of imperial government, namely, the Legislature, the Executive, and the Judicature.

Legislative Supremacy. The British Parliament, that is to say, the King, the House of Lords, and the House of Commons, acting together, can make or unmake any law for any part of the British possessions. This legislative sovereignty is a legal fact, which is now unquestioned.[1] Every one knows that there are self-governing colonies, such as Australia, Canada, New Zealand. But the power of self-government has been given to them directly or indirectly by the British Parliament. Examples will be given later, when we come to treat of such colonies. It is sufficient for present purposes to note that all colonial legislatures are what Professor Dicey calls *non-sovereign law-making bodies*. Their powers of legislation are restrained in at least two, if not three ways:—

1. The greatest independence that a colony or possession can have, while remaining a colony or possession, is self-government. But what does this imply? It means that a colony or possession can govern *itself*, but not *other* colonies

[1] 6 Geo. III. c. 12. See Dicey, *Law of the Constitution*, Pt. I., chaps. i. and ii.

or possessions. Hence arises the first limitation of the powers of its legislature. It cannot make laws for other colonies or possessions, but only *for itself*. The operation of its laws is confined within the territorial limits of the colony.[1] In this respect a colonial legislature differs from the British Parliament, which can legislate for all or any of the British possessions.

2. The second limitation of the powers of a colonial legislature is that it cannot make laws *repugnant to the laws of England*. What this means is explained in section 2 of the Colonial Laws Validity Act of 1865.[2] That section enacts that any law, passed by a colonial legislature, which is repugnant to any Act of Parliament applying to that colony, shall to the extent of such repugnancy be absolutely void. Repugnancy to the laws of England means therefore only inconsistency with British Acts applying to the colony. But Acts of Parliament do not constitute the whole law of England. The laws of England include, in addition to statute law, a body of non-statutory law, which is found only in legal decisions. Colonial legislatures may pass laws repugnant to such non-statutory law.

3. The constitution of a colony or possession is fixed directly or indirectly by the British Parliament. In practically all the British possessions, except the self-governing colonies, that constitution cannot be altered by the colonial legislature. Some of the self-governing colonies can only vary their constitution in certain particulars and not in others. Even in those of the self-governing colonies, which have the widest powers of changing the constitution, constitutional laws cannot, as a rule, be altered in the same manner as other laws, but have to be passed in a particular way.

A law enacted by the legislature of a possession is therefore liable, in any case involving it, to be treated by the colonial Courts and by the Judicial Committee of the Privy Council

[1] *Macleod* v. *A.-G. for New South Wales*, L.R. (1891), A.C. 455.
[2] 28 & 29 Vict. c. 63.

as null or void, on account of being either (*a*) *incompetent*, *i.e.* extending beyond the territorial limits of the possession, or (*b*) *repugnant* to an imperial Act extending to that possession, or (*c*) *unconstitutional*, i. e. conflicting with imperial laws which determine or fix its constitution. Colonial Courts and the Judicial Committee of the Privy Council are thus often called upon in colonial cases not only to determine the *meaning* of a colonial law, but also to examine its *validity*. No English or colonial Court can question the *validity* of an imperial Act. There is thus a difference in *kind* between colonial and imperial Acts.

Constitutional practice in regard to Imperial Legislation. The widest powers of self-government that have been given to any colony or possession are then not without limits. Further, no one doubts that an Act of the British Parliament could take all these powers away; while it is equally certain that no sane British Parliament would ever thus legislate. Indeed the legislative supremacy of the British Parliament over the Crown's dominions is, comparatively speaking, rarely exercised now-a-days. And here it becomes convenient to distinguish *constitutional law* from *constitutional practice*. *Constitutional law* is the body of laws which determine the distribution and exercise of the sovereign power in a state, and which are enforceable in its law courts. *Constitutional practice* is the body of maxims or *customs* which *in fact* regulate much of that distribution and exercise of the sovereign power which is laid down by *law*.[1] Thus the three limits of colonial legislation which we have discussed are *laws*, but the rules which are enumerated below are not *laws*, but *maxims of imperial policy*[2] which have been the growth of many years, and are recognized and generally acted upon by the British Parliament. The first two of these rules may now be regarded as settled by long constitutional practice.

[1] See Dicey, *Law of the Constitution*, introductory chapter.

[2] This has nothing to do with Imperialism or an "Imperial Policy." It is the *general* policy of every British Government, Conservative or Liberal.

(*a*) *The Imperial Parliament will not tax any British possession.* The old view that colonies exist only for profit to the mother country, and are to be administered for that end, has been quite abandoned with regard to British possessions. In 1778 the British Parliament abandoned the right (which of course it could by an Act resume again, but has never resumed) to tax the colonies in North America and the West Indies. This was done in the Taxation of Colonies Act[1] of that year, section 1 of which provides that Parliament "will not impose any duty, tax, or assessment whatever, payable in any of His Majesty's colonies, provinces, and plantations in North America or the West Indies; except only such duties as it may be expedient to impose for the regulation of commerce; the net produce of such duties to be always paid and applied to and for the use of the colony, province, or plantation, in which the same shall be respectively levied, in such manner as other duties collected by the authority of the respective general courts, or general assemblies, of such colonies, provinces, or plantations, are ordinarily paid and applied." The spirit of that Act is now the constitutional rule in respect to all British possessions, although there are one or two exceptions. One exception may be here noticed. Section 670 of the Merchant Shipping Act, 1894,[2] enacts that where any lighthouse, buoy, or beacon has been erected or placed on or near the coasts of any British possession by or with the consent of the legislature of that possession, the Crown may by Order in Council fix such dues to be paid in respect of that lighthouse, buoy, or beacon by the owner or master of every ship which passes the same and derives benefit therefrom, as it may deem advisable. But such colonial light dues are not to be levied unless the legislature of the possession has by address to the Crown, or by Act or ordinance duly passed, signified its opinion that the dues ought to be levied.

So far from Great Britain taxing her possessions, it is

[1] 18 Geo. III. c. 12. [2] 57 & 58 Vict. c. 60.

rather the other way. The self-governing colonies are allowed not only to tax themselves, but also to tax the products of the mother country as they choose. In 1878 Canada imposed a tariff averaging 30 per cent., as compared with a previous one of $17\frac{1}{2}$ per cent., upon all imported goods, whether British or not. British goods were, however, favoured in the arrangement of the tariff as against American goods. "The British Goverment said not a word. Not a single dispatch was written to the Governor-General, as representing the Imperial power, in contravention of the proposals of the Canadian Government. This was a most emphatic proof that the policy originally proposed by Lord Durham, pursued by Lord Elgin, and reaffirmed by subsequent Governors, had obtained full effect, and that henceforward Canada would be left in absolute freedom to do as she thought best for herself." [1]

(*b*) *The Imperial Parliament will not change the constitution of a possession without its consent.* "This view," says Sir Henry Jenkyns, "was not always accepted. In 1838 the constitution of Lower Canada was suspended. The proposal of Lord Melbourne's Government to suspend the Jamaican constitution in 1839 without consulting the colony was opposed by Sir R. Peel, and led to the resignation of the Government.[2] . . . The old constitution of Jamaica was abolished in 1866, but only after the colonial legislature had passed an Act for the purpose; and the same course was adopted in the case of other West Indian islands. If an emergency arose, the ordinary rule might again be disregarded." [3] The Australian Commonwealth was only constituted by imperial legislation, because it was the desire of the Australian colonies so to unite themselves.[4]

[1] Marquis of Lorne, *Imperial Federation*, p. 53.

[2] *Peel's Speeches*, iii. 623. This reference is given by Sir Henry Jenkyns.

[3] *British Rule and Jurisdiction beyond the Seas*, p. 92, footnote 1.

[4] See the preamble of the Commonwealth of Australia Constitution Act, 1900 (63 & 64 Vict. c. 12).

So far we have considered the cases where the British Parliament will *not* legislate. But every one knows that although the British Parliament does not, as a rule, legislate for the internal affairs of the British possessions, yet it has passed, and still does pass Acts which apply to them. What then are the occasions for such imperial legislation? If one may generalize from the British Acts applying to our possessions which have been passed during the last eighty years, a period in which British colonial policy was being developed, it may be said that the chief occasions for the exercise of imperial legislation are, roughly speaking, three in number. So we get three more maxims of imperial policy.

(*c*) *Where it is a matter of imperial policy or concern, the British Parliament will legislate.* Thus the Slave Trade Act of 1824,[1] which consolidated and amended the laws relating to the abolition of slavery, extended to all British possessions, and was by the Slave Trade Act of 1843[2] made further applicable to all British subjects, even where resident in a foreign country. Another instance of parliamentary legislation under this head is the Foreign Enlistment Act of 1870,[3] which provides for the maintenance of the neutrality of all British subjects during the existence of a war between foreign states with which Britain is at peace. The Merchant Shipping Act of 1894,[4] which consolidated the previous statutes upon the subject, also extends to the colonies and possessions of Britain.

(*d*) *Where a law which will operate beyond the territory of a British possession is necessary, recourse must be had to the British Parliament.* The reason of this we have already seen, namely, that colonial laws must not be extra-territorial.[5] It is true that there are exceptions made by imperial statutes. Thus the Legislative Council of British India has in some instances under Acts of the Imperial Parliament power to

[1] 5 Geo. IV. c. 113.
[2] 6 & 7 Vict. c. 98.
[3] 33 & 34 Vict. c. 90.
[4] 57 & 58 Vict. c. 60.
[5] P. 10 above.

legislate for persons outside of India.[1] But the general rule is to the contrary, and hence the necessity for imperial legislation. So in 1881 the Fugitive Offenders Act[2] was passed, which provides that where a person, accused of having committed an offence in one part of His Majesty's dominions, has left that part, such person, if found in another part of the British dominions, shall be liable to be apprehended and returned in the manner provided by the Act to the part from which he is a fugitive.

(*e*) *The British Parliament will legislate for a possession, when application is made to it by the local government for an imperial Act.* This occurs chiefly in two kinds of cases. (i.) A colony or possession sometimes asks for a new constitution, or an amendment of the old, or for union with another or others. Thus in 1854 the colonies of South Australia, Tasmania, New South Wales, and Victoria submitted proposed new constitutions to the Crown for its assent. Express sanction was given by the British Parliament by an Act in the case of each of the two last-named colonies,[3] the two first simply receiving the Crown's assent. Two years prior to that, the Imperial Parliament had, at the request of New Zealand, passed an Act giving it representative government.[4] The Commonwealth of Australia Constitution Act of 1900[5] is another and more recent example of an imperial Act passed in consequence of colonial application. That Act carried out the federation of the six Australian colonies.

(ii.) Application is generally made to the Imperial Parliament when doubt arises as to the validity of a law passed by a colonial legislature. This happened in the case of a law enacted by the legislature of South Australia in 1861.[6] The law was a Redistribution Act, and was thought invalid on the ground that it was *unconstitutional*. Accordingly the

[1] See 24 & 25 Vict. c. 67; 28 & 29 Vict. c. 17; 32 & 33 Vict. c. 98.
[2] 44 & 45 Vict. c. 69.
[3] 18 & 19 Vict. cc. 54–5.
[4] 15 & 16 Vict. c. 72.
[5] 63 & 64 Vict. c. 12.
[6] No. 20 of 1861.

Imperial Parliament was called upon to pass an Act removing all doubts as to its validity. This was done by a Confirmation Act in 1863.[1] The Colonial Laws Confirmation Act of 1901[2] may be cited as one of latest imperial Acts under this head. It confirmed certain Acts of colonial legislatures, the validity of which was open to doubt by reason of their not having been reserved for the signification of her late Majesty's pleasure. The Acts so confirmed were the New South Wales Federal Elections Act,[3] and Parliamentary Electorates Redistribution Act[4]; the Queensland Parliament of the Commonwealth Elections Act, and the Election Acts (1885–1898) Amendment Act[5]; the Western Australia Act to correct certain errors in the Constitution Acts Amendment Act of 1899,[6] and the Constitution Act Amendment Act of 1900.[7]

The three last-mentioned rules must not be taken as an absolutely exhaustive classification of the *customary* occasions for imperial legislation. They are sufficient to show that the legislative supremacy of the Imperial Parliament is not always in abeyance, but that it is now only exercised on special occasions.

Crown Legislation. In subordination to the legislative supremacy of the Imperial Parliament, the Crown may legislate by Order in Council, *i. e.* by Order made at a meeting of the Privy Council, for all colonies acquired by conquest[8] or cession. The British Settlements Act of 1887[9] has also given full power to the Crown to legislate for all new settlements made within the dominions of the Crown, and to establish the necessary courts of justice therein. As we shall see later, the Crown has given up its rights to legislate by Order in Council for certain colonies. Further, when a representative legislature has once been granted to a colony, the Crown's power to legislate by virtue of the prerogative can no longer be

[1] 26 & 27 Vict. c. 84.
[2] 1 Edw. VII. c. 29.
[3] No. 73 of 1900.
[4] No. 84 of 1900.
[5] No. 25 of 1900.
[6] No. 2 of 1900.
[7] No. 5 of 1900.
[8] *Campbell* v. *Hall*, 20 St. Tr. 239.
[9] 50 & 51 Vict. c. 54.

exercised.[1] All such legislation is practically the legislation of the British Ministry for the time being; for at the meetings of the Privy Council called for such purposes, only a few Privy Councillors are summoned, usually from among members of the Cabinet.

Statutory Orders in Council. Crown legislation is but little used, except in Crown colonies, *i. e.* those which have no representative institutions. Even in these, Orders in Council are more the exercise of a statutory power of suspending or of putting into operation an imperial Act within a given colony than an Act of real legislation. In short, they are most often made in pursuance of an Act or Acts of the British Parliament. Thus an Act may be postponed from coming into operation in a colony, until an Order in Council is made putting it into force. The Coinage Act, 1870,[2] gives authority to the Crown to direct that the whole or any part of the Act shall apply to and be in force in any British possession with or without any modifications.[3] Again, the Orders may suspend an Act, or a portion of it, in the case of a colony. Section 18 of the Extradition Act, 1870,[4] provides that where satisfactory provision is made by the legislature of any British possession for carrying into effect within such possession the surrender of fugitive criminals who are in or suspected of being in such British possession, the Crown may by Order in Council suspend the operation within any such British possession of the Act.

Prerogative Orders. In contradistinction to these Orders in Council made under the authority of an Act of the Imperial Parliament, there are issued *Prerogative Orders*, including Charters and Letters Patent. These are issued in virtue of the *Royal Prerogative*, which is defined by Professor Dicey as "the residue of discretionary or arbitrary authority, which at any given time is legally left in the hands of the

[1] *Campbell* v. *Hall*, cited *supra*.
[2] 33 & 34 Vict. c. 10.
[3] *Ibid.* sec. 11 (9). Such directions are made by the Crown with the advice of the Privy Council.
[4] 33 & 34 Vict. c. 52.

Crown." [1] According to present constitutional practice these discretionary powers of the Crown are only exercised on the advice of a responsible Minister or Ministers. The most important examples are the grant of constitutions to colonies, as in the recent case of the Transvaal and Orange River colonies, the appointment of governors, and the establishment of colonial courts of justice.[2] Many of these things are, however, done under statutory authority.

The Crown as part of the Legislature of a Possession. In addition to legislating by Order in Council, the Crown (through the Governor) forms part of the legislature of a British possession, and has the power of assenting or refusing assent to Bills passed by such legislature. This brings us to the consideration of the Crown's "veto."

The Veto. The Crown's right to "veto," *i. e.* refuse assent to, a Bill passed through both Houses of the Imperial Parliament has fallen into desuetude. But the Crown with the advice of the Privy Council, or the Crown acting through its representative, the Colonial Governor, exercises a real veto upon all colonial legislation. In every colony or possession the Governor, who represents, and is appointed by the Crown (or in effect by the British Ministry), has authority to give or withhold his assent to laws passed by the other branches or members of the local legislature, and until that assent is given no such law is valid or binding.[3] Laws are in some cases passed with suspending clauses; that is, although assented to by the Governor, they do not come into operation or take effect in the colony until they have been specially confirmed by the Crown, and in other cases the Imperial Parliament has for the same purpose empowered the Governor to reserve laws for the Crown's assent, instead of himself assenting or refusing his assent to them.[4] Every law which has received the

[1] Dicey, *Law of the Constitution* (5th ed.), p. 354.

[2] Compare the legal maxim, "The King is the Fountain of Justice."

[3] *Colonial Office Rules and Regulations*, 48. These are printed in the *Colonial Office List*, published annually.

[4] *Ibid.* 49.

Governor's assent (unless it contains a suspending clause) comes into operation immediately, or at the time specified. But the Crown retains power to disallow the law; and if such power is exercised, the law ceases to operate from the date at which such disallowance is published in the colony.[1] From this we see that the veto upon colonial legislation is practically exercised in four different ways. (i.) The Governor may refuse his assent to a law passed by a colonial legislature. (ii.) The Governor may reserve such a law for the Crown's assent, instead of himself assenting or refusing his assent to it, and the Crown may refuse such assent. (iii.) The law may be passed with a clause in it preventing it from coming into operation until it has been specially confirmed by the Crown, and no such confirmation may be given. (iv.) The Governor may assent to the law, but the Crown may afterwards disallow that law. In the first three cases the law never gets beyond the stage of what is called *a Bill*. In the fourth case it becomes *an Act*, which is subsequently disallowed. It is convenient to note here that *a Bill* is a proposed law which has not received the Royal Assent. After it receives such assent it becomes *an Act*, although in Crown colonies it is then called *an Ordinance*.[2] The term "veto" is, strictly speaking, applicable only to the first three cases, the last case being a disallowance of an Act and not the vetoing of a Bill.

Constitutional Practice in regard to the Veto. While there are no legal limits to the exercise of this means of control over colonial legislation, there is now a constitutional understanding as to the chief occasions for its exercise, so far at any rate as *the disallowance of colonial Acts* is concerned. These occasions are specified by the late Sir Henry Jenkyns as two in number: "(1) where, in the opinion of the law officers of the Crown, a colonial enactment is *ultra vires*;[3]

[1] *Colonial Office Rules and Regulations*, 50. [2] *Ibid.* 54.

[3] This means beyond the powers of the legislature. See p. 10 above.

and (2) where, if a colonial enactment stands, imperial interests would be prejudiced." [1] It may be added, that the latter class of cases, in which colonial legislation is overruled, is gradually growing smaller. The reason is that the interpretation of "imperial interests" is becoming narrower in its scope. Thus colonial enactments legalizing marriage with a deceased wife's sister were from time to time disallowed on the ground that they were against general public policy. Such enactments have now been allowed, it being no longer considered that marriage with a deceased wife's sister is a matter of imperial concern or policy. The first colonial enactment to this effect was passed in South Australia, and the Crown's assent was not given till the parliament of that colony had passed it five times. Similar statutes now prevail in New South Wales, Tasmania, Queensland, Victoria, West Australia, New Zealand, Canada, Barbados, Mauritius, Natal, and Cape Colony. In South Australia a man may, instead of marrying his deceased wife's sister, marry her daughter.

So far we have been considering the legislative supremacy of the United Kingdom and the different forms in which it is exercised. We must now turn to the executive supremacy of the United Kingdom over its possessions.

Executive Supremacy. Legislation, or the making and unmaking of laws, forms only one function of imperial government. In addition to making laws, there is the necessity of carrying these laws into effect. In every political society or state there must be some person or body of persons which acts on behalf of the whole, which represents the state as dealing with other states, and which represents its collective force and will in maintaining amongst its own citizens the rules which the state has made or accepted for the preservation of order and the promotion of the public welfare.[2] Such person or body of persons has also to wield the force of the state for protection against attack from other

[1] *British Rule and Jurisdiction beyond the Seas*, p. 80.

[2] Sir Wm. Anson, *Law and Custom of the Constitution*, Vol. II. (2nd ed.), pp. 1, 2.

states. This is the *Executive*. Such executive power resides, according to English *law*, in the Crown, and according to constitutional *practice* is exercised by the King, acting on the advice of his Ministers, who are of course members of the Privy Council. Here again the United Kingdom is supreme over Greater Britain.

The British Government exercises the supreme executive power over all the British possessions through the various Secretaries of State. The Home Secretary is responsible for the government of the Isle of Man and the Channel Islands. The Secretary of State for India is responsible for the government of India. The Secretary of State for the Colonies is responsible for the government of all the other British possessions. Each of these Secretaries of State has a permanent staff of civil servants, who compose the Departments of the Home Office, the India Office, and the Colonial Office respectively. Each of these Departments of State has a permanent head official, known as the permanent Under-Secretary of the Department.

Three things with respect to the executive supremacy of Britain over her possessions must be briefly noticed. They relate (1) to the Governor of a possession, (2) to its military and naval defence, (3) to the power of the Crown to bind its possessions by treaty with other powers.

1. ***The Governor.*** In every British possession a Governor is appointed by the Crown, and he exercises the supreme executive power in that possession. In practically all cases he has an Executive Council to assist him. In self-governing colonies that Executive Council consists of the local Ministry for the time being. The functions of a Governor vary according to the class of possession of which he is Governor, and so cannot be fully discussed until we come to deal with the British possessions in detail. But a few general remarks may be made in respect of (*a*) his appointment, (*b*) his power, and (*c*) his liability.

(*a*) ***His Appointment.*** A Governor is appointed by the Crown, and holds office during its pleasure, but is usually

appointed for six years.[1] Each appointment is of course practically an appointment by the British Ministry for the time being. It is now made by Commission under the Royal Sign Manual,[2] in which reference is made to the Letters Patent,[3] creating the office of Governor in the possession. Instructions are also given to the Governor on his appointment, and they are likewise issued under the Royal Sign Manual. All these three documents are known as the "Governor's Commission." A Secretary of State countersigns the Commission under the Royal Sign Manual.

(*b*) ***His Powers.*** It has been decided by the Judicial Committee of the Privy Council that the powers of a Governor are limited by the terms of his Commission, and that he has not all the prerogatives of the Crown, but only such powers as are expressly or impliedly given to him.[4] So with respect to one power, that of pardon, the Chief Justice of Canada expressed in the famous Canadian Pardoning Power case,[5] what is now the generally accepted view, namely, that it "is not incidental to the office of a Colonal Governor, and can only be exercised by such officer in the absence of legislative authority under powers expressly conferred by the Crown." A limited power of pardon, however, is always granted by the Crown to Colonial Governors. But the terms of a Governor's Commission must of course be interpreted in the light of the custom and practice prevailing in his possession.

In addition to the powers given to a Governor by his Commission, it has been stated by Mr. Todd, the eminent author of *Parliamentary Government in the British Colonies*,[6]

[1] *Colonial Office Rules and Regulations*, 7.

[2] This means a document with the royal signature, usually only the initial of the sovereign's name, with R. for *rex* or *regina*.

[3] *Letters Patent* mean an open official document, with the Great Seal affixed, creating some exclusive right, privilege, or office.

[4] *Cameron* v. *Kyte*, 1835, 3 Knapp 332; *Hill* v. *Bigge*, 1841, 3 Moo. P.C.C. 465.

[5] *Att.-Gen. of Canada* v. *Att. Gen. of Ontario*, 23 S.C.R. 468–9.

[6] (2nd ed.) p. 36.

that a Governor has a very large "reserve power," a general devolution "of so much of the authority of the Crown as may be necessary for the purpose of administering the government of the colony over which he is placed by the sovereign, whose office and authority he represents." Sir Henry Jenkyns is much more guarded in his statement about such "reserve power." He says that "there can be little doubt that a Governor will always be held to have had all the power necessary for meeting any emergency which may have required him to take immediate action for the safety of the colony. If he acts in good faith, and, having regard to the circumstances, reasonably, he will be held harmless."[1] Such emergencies are usually riots and insurrections, and there would appear no need for assuming a "reserve power" in a Governor; for every citizen, much more a Governor, is legally bound to try to suppress riot, insurrection, or external attack.[2] But when a Governor is called upon to suppress a riot, he is bound to hit the exact line between excess and failure of duty, and the difficulty of doing so, or the honesty of his intention affords him no legal defence.[3]

Besides the Instructions in his Commission a Governor occasionally receives *special instructions* from the Home Government, and rules for the general guidance of Governors are laid down by the Colonial Office. The special instructions which a Governor may receive come from that Secretary of State who is responsible for the government of the possession in question.

(*c*) ***His Liability.*** It is now settled law that a Governor is legally responsible for his acts. He may be sued both in the High Court in England and in the Courts in his possession,[4] and held liable for damages in respect to injuries caused

[1] *British Rule and Jurisdiction beyond the Seas*, p. 103.

[2] See *Miller* v. *Knox*, 6 Scott 1; *Phillips* v. *Eyre*, L.R. 6 Q.B. 1, at p. 16.

[3] *R.* v. *Pinney*, 3 B. and Ad. 958.

[4] *Hill* v. *Bigge*, 1841, 3 Moo. P.C.C. 465.

to person and property by unlawful acts.[1] But he is not personally liable on contracts made in his official capacity, and he enjoys the same immunity as other judges in his judicial acts.[2] He can, however, be tried in the King's Bench Division of the High Court, or by Special Commission, for crimes committed by him.[3] In 1802 Governor Wall was convicted and hung for murder caused by excessive corporal punishment of one of his garrison, when he was a Governor in West Africa.[4]

2. ***Naval and Military Defence.*** The British Army and Navy, which exist to protect Greater Britain as well as the United Kingdom, are nominally under the command of the Crown. But such forces cannot be raised without the consent of Parliament.[5] They are raised and regulated by the Crown on the advice of the Cabinet. The Secretary of State for War is especially responsible for the Army, and the First Lord of the Admiralty for the Navy, both being Cabinet Ministers.[6] A sub-committee of the Cabinet has recently been formed under the name of the Council of National Defence in order to assist the Cabinet on all questions of war.[7] Officers are commissioned and men are recruited in the name of the Crown.

The regular army forces have now been withdrawn from most of the British possessions except South Africa, India, and those Crown colonies which are really military or naval stations, *e.g.* Gibraltar, Malta, Bermuda. They are maintained also in naval stations in self-governing colonies, *e.g.* in Halifax. For their own defence the various British posses-

[1] *Mostyn* v. *Fabrigas*, 20 St. Tr. 81; *Phillips* v. *Eyre*, L.R. 6 Q.B. 1.

[2] *Anderson* v. *Gorrie* [1895], 1 Q.B. 668.

[3] 11 Wm. III. c. 12. [4] *R.* v. *Wall*, 20 St. Tri. 51.

[5] An annual Army Act is passed every year. See Dicey, *Law of the Constitution*, chap. ix.

[6] Various Acts of Parliament regulate the Navy.

[7] In addition to certain members of the Cabinet, it includes naval and military experts. A Canadian Minister of Defence has been added to it.

sions have a militia and volunteer force. Such local forces are under the control of the local government, but imperial forces remain under the control of the Crown, wherever stationed. The command-in-chief is vested in the Governor. What this really implies is discussed later.[1] None of the British possessions keep a navy; but some colonies keep a few small ships, chiefly for revenue purposes. The self-governing colonies contribute, however, to the up-keep of the British Navy, especially in connection with the squadron stationed near them.

3. ***Power of the Crown to make Treaties.*** The power to make treaties with other states resides in the Crown, but by constitutional practice is exercised by the British Government in the name of the Crown. Imperial treaties legally bind the colonies. No British possession can make a treaty unless it possess authority under an Act of Parliament to do so.[2] But as the legislatures of self-governing colonies need not pass laws necessary to give effect to treaties entered into between Britain and other powers, and as in fact self-governing colonies have often passed Acts in defiance of such treaties, it is now the constitutional practice for the British Government to consult them before including them in any treaty which affects them.[3]

Judicial Supremacy. We have now discussed two functions of government in which the United Kingdom exercises supremacy over its dominions. We now come to the third and last of such functions, in which it is also supreme, namely, when it is remedying or punishing breach of law, or interpreting law. This is the *judicial* function of government.

The *judicial supremacy* of the United Kingdom is exercised through the Judicial Committee of the Privy Council, the Supreme Court of Appeal in civil and criminal cases arising

[1] See p. 36 below.

[2] Todd, *Parliamentary Government in the Colonies* (2nd ed.), pp. 192–18.

[3] See pp. 88–9 below, where this matter is discussed in special connection with the Australian States and Canada.

in the British possessions. As now constituted by the Judicial Committee Acts of 1833[1] and 1881,[2] the Appellate Jurisdiction Acts of 1876[3] and 1887,[4] and the Judicial Committee Amendment Act of 1895,[5] the Judicial Committee of the Privy Council consists of the Lord President for the time being, ex-Lord Presidents, the Lord Chancellor, members of the Privy Council who hold or have held certain high judicial offices, the Lords Justices of Appeal and certain eminent colonial judges. Only a number of these usually sit, three forming a quorum.[6] Colonial appeals are technically to the King in Council, the Judicial Committee hearing them and advising the King. An order of the King in Council is thereupon made in accordance with such advice.

Although it is the inherent prerogative right of the King in Council, as exercised by the Judicial Committee, to have jurisdiction over all Courts in the British possessions and over all civil and criminal cases arising therein, unless it has parted with such authority,[7] appeals from these Courts are limited both by colonial legislation and by practice. The inconvenience and inexpediency of entertaining appeals in criminal cases is so great, and the consequences so entirely destructive of the administration of criminal justice in the colonies or possessions, that the Judicial Committee of the Privy Council is very reluctant to admit an application for such an appeal.[8] Leave to appeal will, however, be granted in special circumstances, such as where a case raises questions of great and general importance in the administration of justice.[9] In civil cases the conditions of appeal are generally that the amount at stake must not be below a certain sum, that leave to appeal must be asked from the colonial court within a certain time after the date of the judgment appealed from,

[1] 3 & 4 Wm. IV. c. 41.
[2] 44 & 45 Vict. c. 3.
[3] 39 & 40 Vict. c. 59.
[4] 50 & 51 Vict. c. 70.
[5] 58 & 59 Vict. c. 44.
[6] 14 & 15 Vict. c. 83, sec. 16.
[7] See the *Falkland Islands* v. *R.*, 1863, 1 Moo. P.C.C. (N.S.), at p. 312.
[8] *Ibid.*
[9] *R.* v. *Bertrand*, 1867, L.R. 1 P.C. 520

and that security must be found. Section 74 of the Commonwealth of Australia Constitution Act, 1900,[1] provides that no appeal shall be permitted to the King in Council from a decision of the Australian High Court upon any question, howsoever arising, as to the limits *inter se* of the constitutional powers of the Commonwealth and those of any Australian State or States,[2] or as to the limits *inter se* of the constitutional powers of any two or more States, unless the High Court shall certify that the question is one which ought to be determined by the King in Council. This is a detraction from the Royal Prerogative to entertain appeals in all cases arising in the British possessions, but it is a detraction by an imperial statute. It is still an open question whether the legislature of a British possession, in the exercise of its general powers, may not only deprive a litigant of his *right* to appeal to the King in Council, but can also exclude him from asking, and the Judicial Committee from granting special leave to appeal as a *matter of grace*.[3] The former is certainly within its power, the latter probably not.

This judicial supremacy is another safeguard against colonial legislatures and governments exceeding their power. The Judicial Committee of the Privy Council, by reviewing the decisions of colonial Courts on questions as to the *validity* of the acts of colonial legislatures and governments, has an opportunity of seeing that the legislative and executive supremacy of the United Kingdom is not impaired.

[1] 63 & 64 Vict. c. 12.

[2] Each of the six Australian Colonies federated by the Act is called in it a State.

[3] *Cushing* v. *Dupuy*, 1880, 5 App. Cas. 409, 416.

PART II

THE COLONIES

CHAPTER III

Classification of Colonies

We have already seen that the British possessions outside of the United Kingdom fall into *two* main divisions, according as they are or are not "colonies" in terms of sub-section 5, section 18, of the Interpretation Act of 1889.[1] For the present we shall confine our attention to those British possessions which are colonies.

Four kinds of Colonies. Colonies differ from each other in respect of mode of government. They are either self-governing or not. Those which are not self-governing have, or have not, a Representative Assembly, that is, an Assembly all or a majority of whose members are elected by the people. Colonies which are not self-governing, and have not a Representative Assembly, have, or have not, a Nominated Legislative Council, that is, a Council all the members of which are nominated by the Crown or the Governor. Hence we arrive at a division of colonies into four classes, which may be regarded as stages in the evolution of colonial constitutions from purely Crown government to self-government. It is the classification adopted by Sir William Anson in his treatise on the *Law and Custom of the Constitution*.[2] The classification is a natural and effective one. It may be thus set forth:—

(1) Colonies in which the legislative power is vested in a Governor alone, while the executive power is also

[1] 52 & 53 Vict. c. 63. See pp. 7, 8, above.
[2] Vol. II. (2nd ed.), pp. 265–272.

exercised by him, either alone or in conjunction with an Executive Council, the members of which are nominated by the Crown, *e.g.* Gibraltar, Labuan, St. Helena.

(2) Colonies in which the legislative power is vested in a Governor and a nominated Legislative Council, and the executive power lies with the Governor and a nominated Executive Council, *e.g.* the Gold Coast, Seychelles, Trinidad and Tobago.

(3) Colonies in which the legislature contains a Representative Assembly, all or a majority of whose members are popularly elected, while the executive consists of the Governor and a nominated Executive Council or Committee, *e.g.* Barbados, Bermuda.

(4) Self-governing colonies, that is, colonies possessing *responsible* government,[1] *e.g.* Australia, Canada.

The first two kinds of colonies are called Crown colonies, but that name is popularly extended to the third class of colonies given above. This extension of the term received a statutory recognition in section 1 of the Federal Council of Australasia Act, 1885,[2] where a "Crown colony" was defined as "any colony in which the control of public officers is retained by Her Majesty's Imperial Government." Each class must now be dealt with in detail.

[1] For the precise meaning of this, see chap. vi. below.
[2] 48 & 49 Vict. c. 60, repealed by 63 & 64 Vict. c. 12.

CHAPTER IV

Crown Colonies strictly so called.

Crown Colonies having no Legislative Council.

The first class of Crown colonies mentioned in the previous chapter is composed of Basutoland, Gibraltar, Labuan, and St. Helena. Of these St. Helena alone has an Executive Council, Gibraltar and Labuan being each administered by a Governor, who has also the power to make Ordinances; while Basutoland is governed by a Resident Commissioner, under the direction of the High Commissioner for South Africa, the latter possessing the legislative authority, which is exercised by proclamation. The Resident Commissioner is assisted by seven Assistant Commissioners for the seven districts into which Basutoland is divided. Ordinary administration is really left to the chief of the native Basutos. But the Assistant Commissioners deal with grave offences, and exercise general supervision. In Gibraltar the Governor is also the Commander-in-Chief of the Garrison. In St. Helena the Governor not only makes Ordinances, but also acts as Chief Justice. The Crown has retained the general power of legislating by Order in Council for Gibraltar, Labuan, and St. Helena, but not for Basutoland.

Crown Colonies having a Legislative Council.

The second class of Crown colonies comprises British Honduras, Ceylon, the Falkland Islands, Fiji, the Gambia, the Gold Coast, Hong-Kong, Lagos, Antigua, St. Christopher and Nevis, Dominica, Montserrat, the Virgin Islands, Mauritius, Seychelles, Sierra Leone, Straits Settlements,

Trinidad and Tobago,[1] Grenada, St. Lucia, St. Vincent, Turks and Caicos Islands, the Transvaal, and Orange River Colony. British Honduras is the only one of these colonies over which the Crown has reserved no power of legislating by Order in Council. Although, generally speaking, the members of the Executive and Legislative Councils in these colonies are nominated by the Crown or by the Governor, certain peculiarities call for notice. In Hong-Kong one member of the Legislative Council is nominated by the Justices of the Peace from their body, and one by the Chamber of Commerce. In Mauritius two members of the Executive Council are elected by the people, and ten out of the twenty-seven members of the Legislative Council are also elected—two for the town of Port Louis and one for each of the eight rural districts. Two of the unofficial members of the Legislative Council in the Straits Settlements are nominated by the Chambers of Commerce of Singapore and Penang. Turks and Caicos Islands were in 1848 placed under the Governor of Jamaica. But they have a Legislative Board composed of the Commissioner and Judge, and of not less than two, nor more than four other persons nominated by the Governor of Jamaica. This Board regulates local taxation and expenditure; but laws passed by the Legislative Council of Jamaica may be made expressly applicable to Turks and Caicos Islands. Laws for the Virgin Islands are made by the Governor of the Leeward Islands. The government of these islands is, however, administered by a Commissioner and an Executive Council.

The Home Government and the Crown Colonies. The relation of the Crown colonies to the United Kingdom is extremely close. Not only is the Governor appointed directly by the Home Government, but also all the principal public officers, and most, if not all, of the members of the

[1] The Trinidad and Tobago Act of 1887 (50 & 51 Vict. c. 44) empowered the Crown to unite Trinidad and Tobago into one colony. This was executed by an Order in Council, dated Nov. 17, 1888.

Legislative Council. It has thus practical control over all legislation and the finances of such colonies. The annual budget is approved of by it, and no act of an unusual nature can be done without its sanction.[1] Elaborate rules have been laid down by the Colonial Office for the guidance of Governors and other colonial public servants, even as to the kind of paper and ink to be used in writing dispatches to the Home Government. It has been wittily said that in a Crown colony there is too much Crown and too little colony. It would be impossible within the limits of a primer to discuss in detail each Crown colony. But the common principles underlying their constitutional structure may be briefly examined.

The Governor. The Governor of a Crown colony is like an absolute, and not a constitutional king. He does not merely reign: he is monarch of all he surveys. In Gibraltar, Labuan, and St. Helena, as we have seen, he makes laws himself. But this of course is subject to special directions from the Colonial Secretary. In other Crown colonies the initiation of all laws belongs in general to him. No money can be appropriated, and no tax can be imposed, except on his recommendation. He gives or withholds his assent to measures passed by the Legislative Council.[2] In various cases a Governor is required by his Instructions to reserve Bills or Draft Ordinances for the royal assent, or to assent to them only with a clause suspending their operation until they are confirmed by the Crown. Generally speaking, these cases comprise measures touching the Currency, the Army and Navy, Differential Duties, the effect of Foreign Treaties, the Prerogative or the rights of British subjects not resident in the colony.[3]

In West Indian Islands which form part of any general government, *e. g.* the different Leeward Islands, every Draft Ordinance must be submitted to the Governor-in-Chief before

[1] See *Colonial Office Rules and Regulations*, chap. xi.
[2] See p. 18 above.
[3] *Colonial Office Rules and Regulations*, 33.

it receives the assent of the Lieutenant-Governor or Administrator. If the Governor-in-Chief considers any amendment necessary, he may either require that amendment to be made before the law is brought into operation, or he may authorize the officer administering to assent to such Draft Ordinance on an express undertaking by the Legislature to give effect to the Governor-in-Chief's recommendation by a supplementary enactment.[1] He convokes and prorogues the Legislative Council.[2] As a general rule, he has the absolute disposal of appointments to public offices which are not of "considerable rank, trust, and emolument," *i. e.* those of which the emoluments do not exceed £100 a year. But he must report every such appointment by the first opportunity to the Colonial Office.[3] When a vacancy occurs in an appointment, the emoluments of which exceed £100 a year but are below £200 a year, he has the *recommendation* to the office, which is almost uniformly followed.[4] He has the power of suspending public servants from the exercise of their functions under certain regulations, which must be strictly observed, and he has also a limited power of dismissal.[5]

The Governor of a colony, though bearing the title of Captain-General or Commander-in-Chief, is not, without special appointment from the Crown, invested with the command of the Regular Forces in the colony. Therefore he cannot undertake the immediate direction of any military operations, or, except in case of urgent necessity, communicate officially with subordinate military officers without the concurrence of the Officer in Command of the Forces.[6] If the colony is invaded, such officer in command assumes entire military authority.[7] But in the event of insurrection or such other general disturbance in the colony, rendering military operations necessary, it is the duty of the Governor to determine the objects with which, and the extent to

[1] *Colonial Office Rules and Regulations*, 55.
[2] *Ibid.* 28.
[3] *Ibid.* 66–7.
[4] *Ibid.* 68.
[5] *Ibid.* 30.
[6] *Ibid.* 10.
[7] *Ibid.* 11.

which the military are to be employed in their suppression. He has therefore to issue to the Officer in Command of the Forces instructions as definite as possible. But after military operations have been determined on, and their object and scope definitely decided, the responsibility for all details of their conduct rests solely with the officer commanding the troops.[1]

A limited power of pardon is always conferred upon a Governor, and this usually extends to pardoning persons imprisoned in colonial gaols under a sentence of a court-martial. But in such a case the Governor must usually consult the Officer in Command of the Forces before granting a pardon.[2] A Governor has generally the power of remitting fines, penalties, or forfeitures which accrue to the Crown. If the fine exceeds £50, he has in some colonies only the power of suspending payment of it until the pleasure of the Crown is known.[3] He has usually the power of granting licences for marriage, letters of administration, and probate of wills, unless other provision is made by the local law. Lastly, a Governor cannot absent himself from the colony without the Crown's permission.[4]

The Executive Council. The Executive Council commonly consists of the chief officers of the local government, such as the Treasurer, the Secretary of the colony, the Attorney-General, etc., with or without certain *unofficial* members, that is, private persons appointed by name. In Ceylon, Fiji, the Gambia, the Gold Coast, Lagos, the Orange River Colony, St. Lucia, Seychelles, Sierra Leone, the Straits Settlements, the Transvaal, Trinidad and Tobago, the Executive Council is composed only of *official* members. In the other Crown colonies it contains one or more unofficial members. These Councillors are appointed by the Governor's Instructions or by Warrant from the Crown. In some cases the Governor has the power of making provisional appoint-

[1] *Colonial Office Rules and Regulations*, 11A.
[2] See p. 22 above.
[3] *Colonial Office Rules and Regulations*, 25.
[4] *Ibid.* 38.

ments, subject to the Crown's confirmation.[1] Members can be dismissed by the Crown alone, but may be suspended by the Governor, following, as far as the nature of the case will allow, his General Instructions as to the suspension of public officers.[2]

The Executive Council has the general duty of assisting the Governor with its advice. In some cases there is a local law that he can only act with such advice. But, generally speaking, he is not absolutely precluded from acting without it, if the public interest requires him to do so. In such a case he must conform to certain special rules laid down in his Instructions. These likewise prescribe the course to be taken by Councillors in recording their opinion in opposition to the Governor's.[3] The Executive Council is thus merely a consultative body.

Section 2 of Burke's Act[4] gives power to the Governor and the Executive Council of a colony to remove any person from his office in the colony for absence without reasonable cause, neglect, or misbehaviour. But care must be taken that the officer is heard in defence after being apprised of the charge against him, and certain rules of procedure prescribed in case of suspension are to be observed. So in *Willis* v. *Sir George Gipps*[5] the Judicial Committee of the Privy Council, although holding that such power of dismissal was exercisable in the case of a Judge of the Supreme Court of the colony, considered that the Governor and Council ought to have given the Judge some opportunity of being previously heard against his dismissal, and on that ground reversed his dismissal. In *Ex parte Robinson*[6] the Judicial Committee of the Privy Council refused to consider an appeal by a Commissioner of Crown lands in a colony against his dismissal by the Governor-General and Executive Council, on the ground that they could not consider such acts as were done by the

[1] *Colonial Office Rules and Regulations*, 59. [2] *Ibid.* 60.
[3] *Ibid.* 56. [4] 22 Geo. III. c. 75.
[5] 5 Moo. P.C.C. 489. [6] 11 Moo. P.C.C. 288.

Governor and Council of a colony in the exercise of the power and authority committed to them, whereby they dismissed persons holding office *only during the pleasure of the Governor* and not *by patent right*, i.e. holding an office created by the Crown and held during its pleasure.

The Legislative Council. The Legislative Council of a Crown colony consists, generally speaking, partly of the principal Executive Officers of the colony and partly of private persons nominated by the Crown.[1] The respective proportions of unofficial to official members are prescribed by the respective Charters constituting the colonies or by the Commissions or Instructions to Governors. There is a majority of official members in the Legislative Councils of Ceylon, Falkland Islands, the Gambia, the Gold Coast, Hong-Kong, Montserrat, Seychelles, Sierra Leone, the Straits Settlements, the Virgin Islands. In Antigua, Fiji, Lagos, Dominica, St. Christopher and Nevis, St. Lucia, St. Vincent, the Turks and Caicos Islands, the official and unofficial members are in equal numbers. In British Honduras, Grenada, the Orange River Colony, the Transvaal, Trinidad and Tobago, the unofficial members are in a majority. This is also the case in Mauritius. The official members are bound to vote for any measure which the British Government may desire passed by the Legislative Council of a colony. When a vacancy occurs by the death, resignation, etc. of an unofficial member, the Governor may in general appoint provisionally to such vacancy until the Crown's pleasure is known.[2] As a general rule, no member of the Legislative Council may, on pain of vacating his seat, absent himself for more than six months except by leave of the Governor.[3]

The authority of the Legislative Council is derived either from (1) the Crown only, as in British New Guinea, Ceylon, Fiji, Hong-Kong, the Orange River Colony, St. Lucia, Seychelles, the Transvaal, Trinidad and Tobago; or (2) an

[1] See, however, p. 34 above for exceptions.
[2] *Colonial Office Rules and Regulations*, 44. [3] *Ibia.* 45.

imperial Act or local Ordinance, as in British Honduras, Falkland Islands, the Gambia, Grenada, the Gold Coast, Lagos, St. Vincent, Sierra Leone, the Straits Settlements, Turks and Caicos Islands. In other words, the Council in the first class of cases is created by the Crown in virtue of its prerogative; in the second class of cases it is created under authority of some imperial Act or local Ordinance.

Powers of the Legislative Council. The Legislative Council must not be regarded as a delegate of the British Parliament. It is "restricted in the area of its powers, but within that area unrestricted and not acting as an agent or delegate."[1] The Legislative Council of a Crown Colony has in general wide powers of legislation.[2] But it cannot change its constitution,[3] and cannot, as a rule, pass any law giving differential treatment in the matter of trade or commerce. It cannot of course enact an extra-territorial law,[4] or one forbidden by its constitution. In certain cases, however, the Legislative Council of a Crown Colony has been authorized by imperial Acts to legislate beyond its territory. Thus by Crown Orders in Council, issued under the authority of the Foreign Jurisdiction Acts, the Legislative Councils of the West African colonies may legislate in order to give effect to all jurisdiction of the Crown acquired in adjoining protectorates.[5] Besides the Colonial Laws Validity Act of 1865,[6] which declares that every colonial legislature has in general the power of making laws for the peace, order, and good government of the colony, provided that they be not repugnant to imperial Acts extending to it, and has generally the power of establishing and reconstituting courts of justice therein,[7] imperial Acts have been passed both before and

[1] Tarring, *Law relating to the Colonies* (2nd ed.), p. 67. See *Powell* v. *Apollo Candle Company*, L.R., 10 App. 282.

[2] See 28 & 29 Vict. c. 63, secs. 1, 3, 4, 5.

[3] *Ibid.* secs. 1, 5.

[4] See p. 10 above.

[5] *Stat. R. and O. Rev.*, Vol. III. pp. 521, 523; *Stat. R. and O. Rev.* (1893), p. 311; *Stat. R. and O. Rev.* (1894), p. 272.

[6] 28 & 29 Vict. c. 63.

[7] *Ibid.* secs. 1–5.

since 1865, conferring upon colonial legislatures special powers of legislation. Crown colonies may establish, maintain, and regulate postal and telegraph offices.[1] Their legislatures may make Ordinances for granting the privileges of naturalization, but such privileges can only be enjoyed within the limits of the colony.[2] This has been done, for example, by British Honduras,[3] Sierra Leone,[4] and Labuan.[5] Lastly we may notice the British Courts of Admiralty Act of 1890.[6] That Act provides that the legislature of a British possession may by any law declare any court of unlimited civil jurisdiction in that possession to be a colonial Court of Admiralty,[7] and confer upon any inferior court in that possession a limited Admiralty jurisdiction.[8] But laws made in pursuance of this Act, unless previously approved by the Crown through a Secretary of State, must be either reserved for the Crown's assent, or contain a suspending clause providing that such law shall not come into operation until the Crown's assent thereto has been publicly signified in the possession in which it has been passed.[9]

The Judicature. All judicial proceedings are carried on in the name of the Crown, and this applies to all British possessions. In Crown colonies the judges are appointed by the Home Government, although, as we have already seen, they may be removed by the Governor and Executive Council for absence without reasonable cause, neglect, and misbehaviour.[10] But they may appeal against such removal to the Judicial Committee of the Privy Council.[11] Most courts in

[1] 12 & 13 Vict. c. 66.
[2] 33 & 34 Vict. c. 14. See sec. 16.
[3] Ordinance, No. 13 of 1883 (amended by Ordinance, No. 8 of 1885).
[4] Ordinance, No. 5 of 1873. [5] Ordinance in 1871.
[6] 53 & 54 Vict. c. 27.
[7] An Admiralty Court tries maritime causes.
[8] 53 & 54 Vict. c. 27, sec. 3.
[9] *Ibid.* sec. 4. [10] See p. 38 above.
[11] See Tarring, *Law relating to the Colonies* (2nd ed.), pp. 162 *et seq.*

the British possessions have been established by Charters under the Great Seal, or by authority of a British Statute. But it has been noticed above that the Colonial Laws Validity Act, 1865,[1] gives power to the legislature of a possession to establish courts therein. In the Falkland Islands and St. Helena the Governor is the Chief Justice. In Fiji, the Gambia, the Gold Coast, Lagos, Sierra Leone, and Turks and Caicos Islands, the Chief Justice is a member of the Legislative Council. Although the functions of the higher judges in a British possession are purely judicial, this is not always the case with inferior ones. Thus the District Commissioners of the Gold Coast and Lagos colonies act not only as magistrates with a limited civil and criminal jurisdiction, but are also required, as a rule, to act as the chief officers, in their respective districts, of the Customs, the Treasury, the Post Office, the Telegraphs, the Constabulary, the Public Works, etc. The jurisdiction of a colonial court is limited to the territory of the colony. But a wider criminal jurisdiction has been conferred by Acts of the British Parliament. So offences committed on a journey between two British possessions may be tried in either.[2] The civil jurisdiction was in maritime matters extended by the Colonial Courts of Admiralty Act, 1890, which has been already mentioned.[3]

The Crown Colony System. The Crown Colony System, with its direct imperial control over local legislation and direct interference by the Home Government in local administration, has not failed to find adverse critics, especially with reference to the West African and West Indian colonies.[4] The principle has been expressed that "it is better to be governed by the devil in a colony than by a board

[1] 28 & 29 Vict. c. 63, see sec. 5.

[2] The Fugitive Offenders Act, 1881 (44 & 45 Vict. c. 69). See Part III. of that Act.

[3] See p. 40 above.

[4] See Salmon's *Crown Colonies*, and Miss Kingsley's works on *West Africa*.

of angels in London." It is not within the province of this primer to discuss the merits or demerits of the system. But it may be pointed out that in many cases it has been but the beginning of constitutional growth towards self-government. Thus New South Wales, Tasmania, Western Australia, and South Australia passed through three stages of constitutional development. "(1) There was first what may be called a Nominee Council, *i.e.* the Governor and three or more persons nominated by the Crown. (2) Then came what may be called a Legislative Council, which consisted of twenty-four, thirty-six, or some similar number of members, of whom one-third were nominated by the Crown, and two-thirds were elected by the inhabitants for five years. (3) Finally, there was what may be called a Parliament (although that term [1] does not commonly occur in the Acts), consisting of the Crown and two Houses, namely, a Council and a Legislative Assembly." [2] Down practically to 1852 the Executive and Legislative Councils of New Zealand were both nominated by the Governor,[3] and many more examples might be given to show that the British possessions usually begin as Crown colonies. By Article 7 of the Articles of Peace signed on behalf of the British Government and those of the Transvaal and Orange Free State on May 31, 1902, it was provided that military administration in the Transvaal and Orange River Colony would at the earliest possible date be succeeded by civil government, and, as soon as circumstances permitted, representative institutions, leading up to self-government, would be introduced. The Transvaal and Orange River Free colonies are now about to pass from the stage of Crown colonies proper to the stage of having representative institutions.

[1] It is now used in 63 & 64 Vict. c. 12.
[2] Jenkyns, *British Rule and Jurisdiction beyond the Seas*, p. 276.
[3] See Chap. IX. below.

CHAPTER V

Crown Colonies popularly so called

We pass now to consider those colonies which, though not self-governing, have a Representative Assembly, all or a majority of whose members are elected by the people on a property franchise. They are seven in number, namely, the Bahama Islands, Barbados, Bermuda, British Guiana, Jamaica, the Leeward Islands (as a whole), and Malta. The Crown has not reserved to itself the power to legislate by Order in Council for any of these colonies with the exception of British Guiana and Malta. These colonies are not self-governing colonies. The Executive Officers, such as the Colonial Secretary, the Colonial Treasurer, the Attorney-General, etc., are appointed by the Crown or the Governor independently of the wishes of the Representative Assembly, and do not depend for holding office upon retaining the support of the majority of the members of the Assembly. These colonies stand, therefore, midway between Crown colonies proper and self-governing colonies. They resemble the latter in having representative institutions, and the former in so far as the Home Government, though its control is less direct than in the case of Crown colonies proper, still exercises a supervision unknown in the case of self-governing colonies. The Crown has no more than a veto on legislation, but the Home Government retains the control of public offices.

Division of such Colonies. The colonies under consideration fall naturally into two classes, according as the legislature is composed of two bodies or of one. In the first

class of colonies the legislature consist of a Legislative Council composed of members nominated by the Crown, and an Assembly composed of members elected by the people. This is the case in the Bahamas, Barbados, and Bermuda. Colonies of the second class have only one legislative chamber, partly elected by the people and partly nominated by the Crown, as in British Guiana, Jamaica, the Leeward Islands, and Malta. In both classes of colonies the Governor forms a necessary part of the legislature, having in many cases by local or imperial law the right of initiation of all measures for the appropriation of public money.[1] He has also the right of dissolving the legislative bodies which are liable to dissolution.[2]

Colonies having a Legislature of two Chambers. In each of the three colonies of the Bahamas, Barbados, and Bermuda, the Legislative Council is composed of nine persons nominated by the Crown. In Bermuda three of the members are official, the other six being unofficial. The numbers of the Representative Assembly vary. In the Bahamas it consists of twenty-nine members elected for fifteen districts; in Barbados, of twenty-four members elected for twelve districts, two for each; and in Bermuda, of thirty-six members, four being elected for each of the nine parishes. In Barbados the House of Assembly is elected annually. There is a varying property qualification for members of the Representative Assembly in the three colonies. But in Bermuda the members of Assembly are paid eight shillings a day for each day's attendance. The qualification for electors also varies, being low in the Bahamas, moderate in Barbados, and highest in Bermuda, where the electoral qualification is the possession of freehold property of not less than £60 in value.

While in these colonies laws are enacted by the Governor with the concurrence of the Legislative Council and House of Assembly, the administration is carried on by a Governor and an Executive which is of various composition. In the Bahamas the Executive consists of the Governor and nine

[1] *Colonial Office Rules and Regulations*, 47. [2] *Ibid.* 28.

members, three of whom are the Colonial Secretary, the Attorney-General, and the Receiver-General, one the President of the Legislative Council; while some of the others are also members of that Council. Those who are not members of the Executive Council *ex officio*[1] are of course nominated. In Barbados the Executive is composed of the Governor, the Officer in Command of the troops, the Colonial Secretary, and the Attorney-General, *ex officio*, and such other persons as are nominated by the Crown, one member of the Legislative Council and four members of the House of Assembly nominated by the Governor. This body is called the Executive Committee as distinguished from the Executive Council, which consists of the Governor, the Officer in Command of the troops, the Colonial Secretary, the Attorney-General, and the President of the Legislative Council. The Governor is the Chairman of the Executive Committee which introduces all money votes, prepares the budget (*i. e.* the estimates of income and expenditure for the coming year, with the sources where the income is proposed to be derived from), and initiates all Government Bills. In Bermuda the Executive or Privy Council comprises the Governor, three members *ex officio*, namely, the Colonial Secretary, Attorney-General, Receiver-General, and two unofficial nominated members.

Colonies having only one Legislative Chamber. In colonies having a single legislative chamber, partly elected and partly nominated, the proportion of nominated members to elected members varies. In Jamaica and the Leeward Islands the Governor *can* nominate enough members to place the elected members in a minority of one. Thus by Crown Orders in Council dated May 19, 1884, and October 3, 1895, the Legislative Council of Jamaica was to consist of the Governor and five *ex officio* members, namely, the Senior Military Officer, the Colonial Secretary, the Attorney-

[1] The *ex officio* members of the Executive Council are the high public officers, such as the Colonial Secretary, Attorney-General, etc.

General, Director of Public Works, and Collector-General, and *such other persons, not exceeding ten in number*, as the Crown might from time to time appoint, *or as the Governor may from time to time provisionally appoint*, and fourteen elected members.

The Federated Leeward Islands. By the Leeward Islands Act of 1861,[1] Antigua, St. Christopher and Nevis, Dominica, Montserrat, and the Virgin Islands have been federated into one colony, called "The Leeward Islands." This is the only example of federation in Crown colonies, while there are two such instances in self-governing colonies, the Commonwealth of Australia and the Dominion of Canada.

The General Legislative Council now consists of eight elected and eight non-elected members, section 7 of the Act which provided for ten of each class of members having been altered. The non-elected members are the Governor, the Colonial Secretary, the Attorney-General, the Auditor-General, the Administrators of St. Christopher and Nevis and of Dominica, and the Commissioners of Montserrat and the Virgin Islands. Three of the eight elected members are chosen by the non-official members of the Legislative Council of Antigua; two by those of that of Dominica; and three by those of the Legislative Council of St. Christopher and Nevis.[2]

In each of the five federated colonies there is an Administrator or Commissioner with an Executive and a Legislative Council.[3] Each of these colonies, viewed separately, is, as we have seen in the preceding chapter, a Crown colony proper. But viewed from the federal standpoint, they constitute one colony with a representative institution.

The General Legislative Council has legislative powers *concurrent* with those of the local legislatures on certain topics specified in the Act, *e.g.* property (including wills,

[1] 34 & 35 Vict. c. 107.
[2] *Ibid.* sec. 8 (amended as in the text).
[3] There is no Legislative Council in the Virgin Islands. See p. 34 above.

testaments, probate, and the administration of estates of deceased persons); mercantile and criminal law; the law relating to husband and wife, parent and child, marriage, divorce and the guardianship of infants; the constitution of courts of law and the civil administration of justice, including jurisdiction, practice, and civil and criminal procedure; the maintenance of a general police force and a common convict station; currency, audit, postal and telegraph affairs; weights and measures; quarantine; lunacy; immigration.[1] It can regulate its own constitution and procedure. Any *local* legislature may, in addition to the above topics, declare other matters to be within the legislative powers of the *federal* legislature. The latter may also repeal or alter any *local* law, and any *local* law which is repugnant to a *federal* law is void to that extent.[2]

The General Legislative Council of the Leeward Islands sits for three years, if not earlier dissolved by the Governor.[3] Money votes must be initiated by one of the official members, or with the express approval or direction of the Governor.[4]

British Guiana and Malta. In British Guiana and Malta the elected members of the legislature are in a majority. The constitution of British Guiana is peculiar. It is composed of the Governor, the Court of Policy, and a Combined Court. The Court of Policy comprises the Governor, seven official members and eight elected members. Its function is legislation, but it cannot impose taxes. The Combined Court is made up of the Court of Policy *plus* six financial representatives elected by people on a property franchise. These six financial representatives must possess a high property qualification. The function of this Combined Court is to impose taxes and audit the public accounts. It also discusses the budget, which is prepared by the Governor and an Executive Council, consisting mostly of official members.

[1] 34 & 35 Vict. c. 107, sec. 10.
[2] *Ibid.* sec. 11.
[3] *Ibid.* sec. 15.
[4] *Ibid.* sec. 23.

In Malta the legislative power is vested in the Council of Government, consisting of eight official members and thirteen elected members. Ten of the elected members are returned by the ten electoral districts into which the Maltese Islands are divided, one for each. The franchise is based upon a property qualification. The other three members are returned by *special* electors, one being elected from the class of the nobility, one from university graduates, and the third from members of the chamber of commerce. The qualification for *special* electors is very much higher than that for ordinary electors. The total number of electors is small in proportion to the number of inhabitants, so that the Council of Government is not representative enough. "It has been found necessary to use the legislative power of the Crown to override opposition by this Council to measures which the Home Government considered to be required in the interests of the majority of the population; and this power has been used even to impose a tax for the expenses of sanitary works." [1] The Council of Government in Malta sits for three years, if not sooner dissolved; while the duration of the legislatures in British Guiana and Jamaica is five years.

Right of Public Meeting in Malta. One peculiarity in the public law of Malta calls for notice. In English public law there is no such thing known as a general right of meeting in public places.[2] In Malta every British subject, who is of full age and who possesses the legal qualifications to be a juror, is entitled to hold a public meeting. But he must give forty-eight hours' notice of such meeting to the Superintendent of Police, stating his name, residence, occupation, and place and time of meeting. If it is an open-air meeting, the Superintendent of Police may indicate another place in substitution for the place named, and may also direct that the meeting be not held on any day on which, in the town or village wherein it is intended to be held, any public solemnity

[1] Jenkyns, *British Rule and Jurisdiction beyond the Seas*, pp. 94 5.
[2] See Dicey, *Law of the Constitution*, Appendix, Note V.

or festival is to be held. The Superintendent of Police may, with the authority of the Head of the Government, make regulations for such meeting, but only for the maintenance of order. The object of the meeting may be a conference, a public discussion, or selection of a candidate for the Council of Government. The meeting cannot be held in a public street, and an open-air meeting cannot be prolonged beyond one hour after sunset. In inhabited places there must not be a procession to or from a public meeting.[1]

The Executive Council. Very little need be said about the Executive in this class of colonies. In Jamaica the government is administered by a Privy Council. According to the Orders in Council which now determine the constitution of Jamaica,[2] it is composed of the Lieutenant-Governor (if any), the Senior Military Officer, the Colonial Secretary, the Attorney-General, and such other persons, not more than eight in number, as may be appointed by the Crown, or provisionally nominated by the Governor subject to approval by the Crown. The Governor presides at each meeting, and with other two members forms a *quorum*. The Executive Councils in the Leeward Islands and Malta are, like that in British Guiana, mostly composed of official members, the Leeward Islands Act[3] merely saying that the Executive Council is to be composed of such members as the Crown appoints.

General conclusions. The legislatures of the colonies discussed in this chapter have all the powers of those of Crown colonies proper, and some have more. Thus the General Legislative Council of the Leeward Islands has power to alter the constitution by an ordinary act of legislation, that is to say, the constitution may be changed by the same body and in the same way as ordinary laws are passed. But a Bill to alter its constitution must be reserved by the Governor for the Crown's assent.[4] Again, the initiation of

[1] Ordinance No. 11 of 1898. [2] See p. 46 above.
[3] 34 & 35 Vict. c. 107. See sec. 5. [4] *Ibid.* sec. 30.

laws is not in general vested in the Governor alone, unless they deal with finance or taxation. The budget has usually to be approved of by the Representative Assembly. Although the judges are as a rule appointed from home by the Home Government, all legal posts in Malta are filled by members of the profession in the colony.

Privileges of Colonial Legislatures. Before passing to the subject of self-governing colonies, a few words must be said about the *privileges* of the legislatures of Crown colonies, whether strictly or popularly so called. Every one knows that the Houses of Parliament in Britain and the members thereof enjoy certain privileges. Thus an individual peer has right of access to the King. The members of both Houses enjoy freedom of speech, etc. But the most important right of all is the power to commit to prison by the Speaker's warrant any one who, in the opinion of the House, has been guilty of contempt of that House.[1] These privileges are known as the *Lex et Consuetudo* (*i. e.* law and custom) of Parliament, established by ancient usage from time immemorial. It has been definitely decided in several cases by the Judicial Committee of the Privy Council that the powers incident to or inherent in a colonial legislature are such as are necessary to the existence of such a body and the proper exercise of its functions, and do not justify imprisonment or fine of any one or unconditional suspension of a member during the pleasure of the legislature.[2] Thus a colonial legislature may remove any one from the House who is making a disturbance. But it cannot inflict punishment.[3] In other words the privileges of the British Parliament belong *exclusively* to it ;[4] although, as we shall see later, the British Parliament often confers these privileges on the parliaments of self-governing colonies.

Such being the case, the legislatures of Crown colonies

[1] See Dicey, *Law of the Constitution* (5th ed.), p. 56.
[2] *Barton* v. *Taylor*, L.R. 11 App. 197.
[3] *Doyle* v. *Falconer*, L.R. 1 P.C. 328.
[4] See *Fenton* v. *Hampton*, 11 Moo. P.C.C. 347.

often pass laws, so far as their constitution permits them, to define and declare their own powers in this respect. A recent example will be found in an Ordinance of the Transvaal Legislative Council.[1] It confers upon itself and its members freedom of speech.[2] The publication of any official report, paper, votes, or proceedings in the legislature is privileged, and all proceedings against any one for publishing such are to be at once stopped on production of a certificate that such reports, etc. were published by order of the Legislative Council.[3] The Council has also power to order the attendance of witnesses by summons.[4] It is empowered to punish by *fine*, or *by imprisonment till the fine be paid*, for certain contempts of the House from time to time set forth and declared to be such in any Standing Order of Council.[5] At present it may so punish any one for (1) disobedience to attend as a witness, when summoned, or to produce documents (unless these are of a private nature and irrelevant to the subject of inquiry),[6] or (2) refusal to be examined as a witness or to answer lawful and relevant questions, or (3) creating or joining in any disturbance in the vicinity of the Chamber and during the meeting of Council, whereby its meetings may be interrupted.[7] Any person disturbing a meeting of the Legislative Council may be arrested without a warrant.[8] Wilfully false answers given by witnesses, when summoned and examined by order of the Council in any inquiry or proceeding, are punished as in convictions for wilful and corrupt perjury.[9]

[1] No. 34 of 1903. [2] *Ibid.* sec. 2. [3] *Ibid.* sec. 3.
[4] *Ibid.* secs. 4–5. [5] *Ibid.* sec. 7. [6] *Ibid.* sec. 6.
[7] *Ibid.* sec. 7. [8] *Ibid.* sec. 1. [9] *Ibid.* sec. 13.

CHAPTER VI

Self-governing Colonies

The position of the Executive. A colony reaches the highest stage of its constitutional development when it becomes self-governing. The essential difference between self-governing colonies and all others is in the position of the Executive. In the colonies which we have been discussing the Executive Officers, *e. g.* the Colonial Secretary, the Colonial Treasurer, and the like, as well as the unofficial members of the Executive Council, are appointed by the Crown or the Governor, and hold office during the Crown's pleasure. From a legal point of view this is also the case in self-governing colonies ; but then *different Instructions* are given to the Governor. In colonies possessing what is called Responsible Government the Governor is empowered by his Instructions to appoint and remove Members of the Executive Council, *it being understood that Councillors who have lost the confidence of the local Legislature will tender their resignation to the Governor or discontinue the practical exercise of their functions in analogy with the usage prevailing in the United Kingdom.*[1] In other words, the Executive in self-governing colonies is, according to constitutional usage, if not according to strict law, appointed and dismissed by the Legislature.

The Cabinet System. Every one knows that in the United Kingdom the Secretaries of State and other important officials resign when the party to which they belong can no

[1] *Colonial Office Rules and Regulations*, 57.

longer command a majority in the House of Commons. This is what is meant by saying that the Executive is appointed and dismissed by the Legislature; for the various Secretaries of State and other important officials, such as the First Lord of the Treasury, the Chancellor of the Exchequer, etc., form the Chiefs of the Executive Departments by which the actual work of governing the country is carried on. This is known as the Cabinet System. "The Cabinet is to us a definite body, unknown to the law, but known well enough in fact; it consists of a group of persons who are collectively responsible for the policy and government of the country; it is not the Executive, but it controls and guides the Executive, and it contains the chiefs of the great executive departments; these persons are selected by, and work under a chief whom we call the Prime Minister, and he is the most important member of that political party which for the time is in a majority in the country and the House of Commons."[1] Although when we discuss the self-governing colonies we shall find differences in detail between the Cabinet System as it prevails in the United Kingdom and as it prevails in the colonies, in fundamentals it is the same. The executive power is vested in the Governor, but is exercised by ministers who depend upon the support of the majority of the popularly elected assembly and are responsible to it, *i. e.* liable to lose office if they cannot retain its confidence. But it may be noted that while the Cabinet System in Great Britain rests entirely on *constitutional practice*, certain features of it are reproduced as *law* in some of the self-governing colonies. This is also the case with regard to the control of the Lower House of Parliament over money Bills.

Other peculiarities of self-governing Colonies. All the self-governing colonies have a Parliament of two Houses, the Lower House being the more popular and deciding the fate of a Ministry. The powers, privileges and immunities of the House of Commons and its members

[1] Anson, *Law and Custom of the Constitution*, Vol. II. (2nd ed.), p. 105.

are generally, directly or indirectly, given to their Parliaments.[1] One such privilege, long since abandoned by the House of Commons, namely, the power to decide all questions as to disputed elections,[2] has been retained by the Parliaments of some self-governing colonies in their own hands.[3] The Canadian Parliament is an exception. It has followed the example of the British Parliament in handing over the trial of such questions to the Judicature,[4] and the Canadian Provinces have adopted the same rule. In all self-governing colonies the judges are appointed by the Colonial Government and not by the Home Government. Lastly, the territories of a self-governing colony cannot be altered without its consent.[5]

The Governor. The only officer appointed by the Home Government in self-governing colonies is the Governor or Governor-General, and any particular person will not be intruded as such upon a self-governing colony if it objects to him. Thus Queensland refused to accept Sir Henry Blake as Governor in 1888, and he was in consequence made Governor of Jamaica. South Australia quickly followed this example in objecting to the nomination of the Marquis of Normanby. Newfoundland had previously objected to Sir Ambrose O'Shea being made Governor.

The position of a Governor in a self-governing colony is very different from that of a Governor of a Crown colony. It seems to approximate to that of a constitutional monarch, say, in the United Kingdom. But there are, in fact, three theories or views adopted by writers on this subject.

1. Mr. Goldwin Smith takes an extreme view of the *utter irresponsibility* of the Governor. "A Governor is now politically a cipher. He holds a petty court, and bids

[1] See p. 51 above.

[2] See the Parliamentary Elections Act of 1868, 31 & 32 Vict. c. 125.

[3] See, for example, the Victoria Constitution Act Amendment Act of 1890, secs. 291–3. 300, 2, 304, 307–8; the Commonwealth of Australia Constitution Act of 1900 (63 & 64 Vict. c. 12), sec. 47.

[4] Revised Statutes of Canada (1886), c. 9.

[5] 58 & 59 Vict. c. 34, sec. 2.

champagne flow under his roof, receives civic addresses, and makes flattering replies; but he has lost all power, not only of initiation, but of salutary control."[1] The evil social effects of such "petty courts" have been enlarged upon by Australians, as importing into new and socially unsophisticated countries "the paraphernalia of an old country which has been ruled by monarchical pageant and aristocratic luxury for many centuries."[2] In support of his view, Mr. Goldwin Smith cites the unhappy Pacific Railway Scandal, where the then Governor-General of Canada, deeming it his constitutional duty to act upon the advice of his Ministry, even though they were the accused, transferred the inquiry from the Canadian Parliament to a Royal Commission appointed by themselves.

2. At the opposite extreme is the view of the late Mr. Todd. We have already noticed the wide terms in which he asserts a large "reserve power" as belonging to a Governor.[3] "A constitutional governor," he says, "is not merely the source and warrant of all executive authority within his jurisdiction: he is also the pledge and safeguard against all abuse of power, by whomsoever it may be proposed or manifested."[4] Again, he asserts that "whenever bills are tendered to a Governor of a colony for the purpose of receiving the Royal assent, he is bound to exercise his discretion in regard to the same, and to determine upon his own responsibility as an imperial officer, unfettered by any consideration of the advice which he has received from his own Ministers on the subject, the course he ought to pursue in respect to such bills."[5] In short, Mr. Todd apparently maintains that the Governor is bound to use his own discretion as to the exercise of all such legal powers as are vested in him, *e. g.* the power of pardon, of dissolving the Lower House, etc.[6]

[1] *Questions of the Day*, p. 171.
[2] *Australasia* (in the *British Empire Series*), p. 31.
[3] See pp. 22–3 above.
[4] *Parliamentary Government in the British Colonies* (2nd ed.), p. 36.
[5] *Ibid.* p. 169. [6] *Ibid.* Pt. III., chap. xvii.

3. But it seems possible to make a compromise between these two extreme views, and in doing so one can claim the authority of so great a writer as the late Sir Henry Jenkyns, who, though following Mr. Todd to a great extent, holds more moderate opinions.[1] We have to distinguish the Governor in his two capacities, (1) as an imperial officer, and (2) as a local officer. In imperial matters, such as granting pardon in cases where it might affect the empire, or any country beyond the colony, by letting go a dangerous criminal, or in assenting to measures affecting imperial treaties, the Governor, although in constitutional practice bound to consult his Ministers, need not follow their advice. But in purely local matters he ought almost invariably to follow the advice of his Ministry. They, and not he, are responsible in such cases. He must not act contrary to law, as by assenting to a bill which it is beyond the powers of the colonial legislature to pass. But, generally speaking, he is in the hands of his Ministers, and this is growing more and more to be the constitutional practice, extending even to imperial matters. Thus in Canada at the present day the Governor-General never vetoes a bill. But further discussion of the Governor's functions must be postponed till we deal with the self-governing colonies in detail.

Powers of changing the Constitution. Before entering upon that task, we may shortly notice an important feature in the legislative power of self-governing colonies. Generally speaking, their legislatures have the power of changing their constitutions, though we shall see later that in the case of some colonies such power is limited. The Colonial Laws Validity Act, 1865,[2] an Act which Professor Dicey[3] calls "the charter of colonial legislative independence," provides in section 5 that "every representative legislature shall, in respect to the colony under its jurisdiction, have,

[1] *British Rule and Jurisdiction beyond the Seas*, chap. vi.
[2] 28 & 29 Vict. c. 63.
[3] *Law of the Constitution* (5th ed.), p. 99.

and be deemed at all times to have had, full power to make laws respecting the constitution, powers, and procedure of such legislature; provided that such laws shall have been passed in such manner and form as may from time to time be required by any Act of Parliament, Letters Patent, Order in Council, or colonial law for the time being in force in the said colony." According to section 1 a "representative legislature" means any colonial legislature which comprises a legislative body of which one half is elected by inhabitants of the colony.

Division of self-governing Colonies. The self-governing colonies may be geographically divided into (1) the Australasian group (which includes New Zealand), (2) the Canadian group, and (3) the South African group. But it must be remembered that the *Provinces* of the Dominion of Canada are not self-governing colonies;[1] while the Australian colonies remain self-governing colonies, although now states of the Commonwealth of Australia.

[1] See Schedule to 58 & 59 Vict. c. 34.

CHAPTER VII

The Commonwealth of Australia

The Australian Colonies. The Commonwealth of Australia consists of the six federated colonies of New South Wales, Tasmania, Western Australia, South Australia, Victoria, and Queensland. New South Wales was the earliest colony, being founded in 1788. When proclaimed as a colony on February 7 of that year, it comprised not only what is now known as New South Wales, but also Tasmania, Victoria, and Queensland, as well as part of New Zealand. In 1825 Tasmania was proclaimed a colony independent of New South Wales. In 1850 the Australian Constitution Act[1] made Victoria a separate colony, and by Letters Patent of June 6, 1859, confirmed by the Australian Colonies Act of 1861,[2] Queensland also became a colony distinct from New South Wales. New Zealand was severed from New South Wales in 1842. In 1836 South Australia was proclaimed by the King in Council a British colony under the powers contained in the Government of South Australia Act, 1834;[3] while in 1829 Western Australia had been declared a British colony by settlement. Prior to 1900, what is now known as the Colony of New South Wales, Tasmania, Western Australia, South Australia, Victoria, and Queensland all existed as separate self-governing colonies.

Proposals for Union. The separate colonies soon

[1] 13 & 14 Vict. c. 59. [2] 24 & 25 Vict. c. 44.
[3] 4 & 5 Wm. IV. c. 95.

came into conflict with one another, chiefly over the tariff question. The regulation of inter-colonial trade was always a difficulty. As time rolled on, there grew up competing "naturalization laws, and land systems, rival schemes of immigration and of ocean postage, a clumsy and inefficient method of communication with each other and with the Home Government on public business."[1] From time to time various suggestions were made as to the expediency of some general form of government. Conferences between the colonies were frequently held. No fewer than ten such conferences took place between 1863 and 1883. The last, summoned by Sir Henry Parkes in 1883, led to imperial legislation in the passing of the Federal Council of Australasia Act, 1885.[2] This Act created a Council of two, afterwards increased to five members from each colony to legislate for the Australasian colonies on certain matters of general importance to them all, *e.g.* their relations to the Pacific Islands, fisheries in Australasian seas outside of the territorial waters, extradition of offenders from each colony, etc. This scheme did not prove a success, and negotiations for a better union went on, until finally conventions of delegates from the different colonies authorized to frame a federal constitution by the legislatures of their respective colonies, held at Adelaide, Sydney, and Melbourne during the years of 1897 and 1898, formally framed a Bill to constitute a Commonwealth. This Bill was amended at a conference of the Colonial Premiers in Melbourne during 1899, and adopted on a referendum to the electors of New South Wales, Victoria, Queensland, South Australia, and Tasmania in the same year. Thereupon it was sent to London with addresses to the Queen from both Houses of Parliament in each colony, praying that it might be passed into law. Introduced as a Bill to the House of Commons on May 14, 1900, it became an Act, after certain amendments, on July 9 in the same year. "The federation

[1] See Report of Mr. Charles Grant Duffy's Committee, quoted by Professor Harrison Moore, *Commonwealth of Australia*, p. 24.

[2] 48 & 49 Vict. c. 60.

of Australia was a popular act, an expression of the free will of the people of every part of it, and therein, as in some other respects, it differs in a striking manner from the federation of the United States, of Canada, and of Germany."[1]

The Constitution of the Commonwealth. The Commonwealth of Australia Constitution Act, 1900,[2] repeals the Federal Council of Australasia Act, 1885,[3] and unites the colonies of New South Wales, Victoria, South Australia, Queensland, Tasmania, and Western Australia[4] in a Federal Commonwealth, which became established on January 1, 1901. Each of these colonies is called a State.[5] The Act deals with the three necessary departments of government, the legislature, the executive, and the judicature.

The Federal Parliament. The legislative power of the Commonwealth is vested in a Federal Parliament consisting of the Crown, the Senate, and the House of Representatives.[6] A Governor-General, appointed by the Crown, is the Crown's representative.[7] Provision is made for the Parliament meeting once at least every year.[8]

The Senate. The Senate is composed of senators for each State, directly chosen by the people of each State. The Act provides for six senators for each Original State,[9] who are elected for a term of six years. Power is given to the Federal Parliament to alter the number of senators for each State, but so that equal representation of the several Original States shall be maintained and that no Original State shall have less than six senators.[10] The President of the Senate is

[1] Harrison Moore, *Commonwealth of Australia*, p. 61.

[2] 63 & 64 Vict. c. 12.

[3] 48 & 49 Vict. c. 60. See sec. 7 of the opening clauses of 63 & 64 Vict. c. 12.

[4] As regards Western Australia, see sec. 3 of the opening clauses of the Act, and the Royal Proclamation of September 17, 1900, relating thereto.

[5] Sec. 6 of the opening clauses.

[6] Sec. 1.

[7] Sec. 2.

[8] Sec. 6.

[9] An Original State means a State which was part of the Commonwealth at its establishment (sec. 6 of the opening clauses).

[10] Sec. 7.

chosen by the senators from amongst themselves.[1] At least one-third of the whole number of the senators must be present to constitute a meeting of the Senate for the exercise of its powers. But the Federal Parliament may make other provision.[2] The Senate has a continual existence, and cannot be dissolved except in case of a "deadlock."[3] The senators are to withdraw gradually at the expiration of three years, one half of them retiring then, and the second half at the end of six years. After that the places of senators shall become vacant at the end of six years from the beginning of their term of service.[4]

House of Representatives. The House of Representatives is composed of members chosen by the people of the Commonwealth, and the numbers of these members is to be, as nearly as practicable, twice the number of senators.[5] The number of members chosen at the first election was as follows:—twenty-six for New South Wales, twenty-three for Victoria, nine for Queensland, seven for South Australia, five for Western Australia, and five for Tasmania.[6] But the Parliament can alter such number according to the manner prescribed in the Act, by which the number of members chosen in the several States are to be proportional to the respective numbers of their people.[7] The House of Representatives sits for three years, unless sooner dissolved.[8] The qualification of electors of members of the House of Representatives is the same as that of electors of senators,[9] and was at the first election in each State that which was prescribed by the law of the State as the qualification of electors of the more numerous House of Parliament of the State. Parliament could, however, enact otherwise. But the principle of "one man, one vote" was laid down.[10] A man is

[1] Sec. 17. He can vote. In the case of equality of votes, the question is decided in the negative (sec. 23).
[2] Sec. 22.
[3] See p. 67 below.
[4] Sec. 13.
[5] Sec. 24.
[6] Sec. 26.
[7] Sec. 24.
[8] Sec. 28.
[9] Sec. 8.
[10] Sec. 30. See p. 76 below for the present franchise established by the Federal Parliament.

of course entitled to vote both for senators and members of the House of Representatives. A senator or member of the House of Representatives must be an elector, or qualified to become one. He must be not less than twenty-one years of age, and a British subject, either natural-born or for at least five years naturalized under the law of the United Kingdom, or of a colony which has become or becomes a State, or of the Commonwealth or of a State. He must also have been resident for three years within the limits of the Commonwealth.[1]

The disqualifications for membership of either House are these: —

(1) Allegiance or adherence to a foreign power.
(2) Being attainted of treason, or convicted, or subject to be sentenced, for any offence punishable under the law of the Commonwealth or a State by imprisonment of one year or more.
(3) Bankruptcy or insolvency.
(4) Holding a place of profit under the Crown, or any pension payable during the pleasure of the Crown out of the Revenues of the Commonwealth, except as a Minister of State for the Commonwealth or a Minister of a State, or an officer of the Army and Navy.
(5) Being pecuniarily interested in a contract with the Federal Government, otherwise than as a member of an Incorporated Company of more than twenty-five persons.[2]

A member of either House vacates his seat (i.) by becoming disqualified as above, or (ii.) taking the benefit, whether by assignment, composition, or otherwise, of the law relating to bankrupts and insolvent debtors, or (iii.) taking, or agreeing to take, any fee for services rendered to the Commonwealth, or for services rendered in Parliament to any person or State.[3]

[1] Sec. 34. [2] Sec. 44. [3] Sec. 45.

A member of either House may, by writing addressed to the President (in the case of a senator), or to the Speaker (in the case of a member of the House of Representatives), or to the Governor-General in the absence of the President or of a Speaker, resign his place.[1] This is an improvement upon the antiquated English method of resignation, according to which a member of the House of Commons can only resign by getting himself nominally appointed to a disqualifying office, *e.g.* the Stewardship of the Chiltern Hundreds. Each senator and each member of the House of Representatives is paid £400 a year, until Parliament enacts otherwise.[2] A member of either House of Parliament is incapable of being chosen or of sitting as a member of the other House.[3] The House of Representatives chooses its own Speaker, and until Parliament otherwise provides, one-third of its members constitutes a quorum.[4]

Exclusive powers of the Federal Parliament. The Federal Parliament has general power to make laws for the peace, order, and good government of the Commonwealth with respect to certain specified subjects, thirty-nine in number, such as trade, taxation, bounties, borrowing, postal services, naval and military affairs, statistics, currency, involvency, divorce, marriage, railways, immigration and emigration, etc.[5] Some of its legislative powers are *exclusive*, *i. e.* they can only be exercised by the Federal Parliament and not by the State Parliaments. The Federal Parliament can alone legislate with respect to—

(1) The seat of Government of the Commonwealth (which was fixed in July of last year (1904)[6] at Dalgety on the Snowy River in New South Wales, 296 miles south of Sydney), and all places acquired by the Commonwealth for public purposes.

[1] Secs. 19, 37. [2] Sec. 48. [3] Sec. 43.
[4] Secs. 35, 40. The Speaker has a casting vote in case of equal voting. [5] Sec. 51.
[6] Only after a deadlock between the two Houses.

(2) Matters relating to any department of the public service the control of which is by the Constitution transferred to the Executive Government of the Commonwealth.

(3) Other matters declared by this Constitution to be within the exclusive power of the Parliament.[1]

The administrative services, referred to under head (2) as being transferred from each State to the Executive Government of the Commonwealth, and so forming subjects for the exclusive legislation of the Federal Parliament, are five in number:—(i.) posts, telegraphs, and telephones; (ii.) naval and military defence; (iii.) lighthouses, lightships, beacons, and buoys; (iv.) quarantine; (v.) customs and excise.[2] The other matters, referred to under head (3), comprise in general all matters which are *national* in character, or which permit only of one uniform system of regulation, *e.g.* certain subjects of finance, trade, and commerce. Certain general principles are expressly laid down in the Act, namely, uniformity of bounties, absence of discrimination in taxation,[3] and of preference of trade, commerce, and revenue.[4]

Concurrent powers of the Federal Parliament.

The other powers of legislation which are vested in the Federal Parliament are *concurrent* with those possessed by the Parliaments of the States. The Act, however, provides that when a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall to the extent of the inconsistency be void.[5] Some of these concurrent powers of legislation can be exercised only (1) with the *consent* of the State concerned, *e.g.* the acquisition of State railways, railway construction and extension in any State;[6] or (2) at the *request* or with the *concurrence* of the State or States directly concerned, namely, the exercise of

[1] Sec. 52. [2] Sec. 69.
[3] Sec. 51, Arts. ii. and iii. [4] Sec. 99. [5] Sec. 109.
[6] Sec. 51, Arts. xxxiii., xxxiv.

any power which could at the establishment of the Constitution be exercised only by the British Parliament or by the Federal Council of Australasia ;[1] or (3) on *reference* by a State or States, namely, any matters so referred, but so that the law shall extend only to States by whose Parliaments the matter is referred, or which afterwards adopt the law.[2]

Powers of each House of Parliament. Proposed laws appropriating revenue or moneys, *i. e.* determining the mode in which these are to be spent, or proposed laws imposing taxation, cannot originate in the Senate ; nor can the Senate amend proposed laws imposing taxation, or proposed laws appropriating revenue or moneys for the ordinary annual services of the Government. Further, the Senate cannot amend any proposed law so as to increase any proposed charge or burden on the people. But the Senate may at any stage return to the House of Representatives any proposed law which it cannot amend, requesting, by message, the omission or amendment of any items or provisions therein. And the House of Representatives may, if it thinks fit, make any of such omissions or amendments, with or without modifications. In all other respects the Senate has equal power with the House of Representatives with regard to all proposed laws.[3]

To some extent the Senate is thus placed in the same position as the House of Lords. But whereas it is only a *convention* or *custom* of the English Constitution (which cannot be enforced in the law courts), that the House of Lords cannot originate or amend money bills, it is a *law* (to the extent above described) in the case of the Senate of the Australian Commonwealth.

Disagreement between the Houses. Elaborate provision is made for the contingency of disagreement between the Senate and the House of Representatives. If the House of Representatives passes any proposed law, and the Senate rejects or fails to pass it, or passes it with amendments to

[1] Sec. 51, Art. xxxviii. [2] *Ibid.* Art. xxxvii. [3] Sec. 53.

which the House of Representatives will not agree, and if after an interval of three months the House of Representatives, in the same or the next session, again passes the proposed law, with or without any amendments which have been made, suggested, or agreed to by the Senate, and the Senate rejects or fails to pass it or passes it with amendments to which the House of Representatives will not agree, the Governor-General may dissolve the Senate and the House of Representatives simultaneously. But such dissolution cannot take place within six months before the date of the expiry of the House of Representatives by effluxion of time. If after such dissolution the House of Representatives again passes the proposed law with or without any amendments which have been made, suggested, or agreed to by the Senate, and the Senate again rejects or fails to pass it, or passes it with amendments to which the House of Representatives will not agree, the Governor-General may convene a joint sitting of the two Houses, and the proposed law may after deliberation be passed by an absolute majority of the total number of the members of both Houses.[1]

Privileges of Parliament. The powers, privileges, and immunities of the Senate and of the House of Representatives, and of the members and committees thereof, are to be such as are declared by the Federal Parliament. Until so declared, they are those of the British House of Commons, and of its members and committees, at the establishment of the Commonwealth.[2] Each House makes rules and orders with respect to (1) the exercise and enforcement of its powers, privileges and immunities, and (2) the order and conduct of its business and proceedings.[3] The chief privileges of the British House of Commons at the establishment of the Commonwealth were the following :—

(1) To regulate its own internal affairs.
(2) To have access to the Crown through the Speaker.
(3) To punish for contempt by imprisonment or expulsion.

[1] Sec. 57. [2] Sec. 49. [3] Sec. 50.

Individual members enjoyed the privileges of (1) immunity from being summoned as witnesses and from serving on juries, (2) freedom of speech in debate, and (3) freedom from arrest in civil cases in going to, staying at, and returning from Parliament. The Committees have power to summon persons as witnesses and to produce relevant documents.[1]

The Executive. The executive power of the Commonwealth is vested in the Crown, and is exercisable by the Governor-General as representing the Crown, and extends to the execution and maintenance of the Constitution and of the laws of the Commonwealth.[2] It is therefore not limited to the execution of the laws passed by the Federal Parliament. It has to maintain the Constitution, or, in other words, guard the Commonwealth of Australia Constitution Act, 1900. The Governor-General has thus the fullest executive powers without special grant from the Crown. In this respect his position differs from that of a Governor of any one of the six Australian States which compose the Commonwealth. The powers of such a Governor are limited to the terms of his Commission.[3] Thus in *Toy* v. *Musgrove* [4] it was held *ultra vires* of the Governor of Victoria to exclude aliens, no such power having been conferred upon him by the Letters Patent, Commission, or Instructions.

Powers of the Governor-General. The principal powers of the Governor-General are these. (1) He summons, prorogues, and dissolves the Parliament.[5] But the Commonwealth Act imposes certain limitations. After any general election Parliament must be summoned to meet not later than thirty days after the day appointed for the return of the writs.[6] There must be, as we have already seen, a session of Parliament once at least in every year.[7] The powers of dissolution

[1] See Anson, *Law and Custom of the Constitution*, Vol. I. (3rd ed.), pp. 136–178.
[2] Sec. 61.
[3] See p. 22 above.
[4] 1888, 14 V.L.R. 349.
[5] Letters Patent creating the office of Governor-General of Australia, sec. 5, and sec. 5 of the Act.
[6] Sec. 5.
[7] Sec. 6.

apply only to the House of Representatives,[1] and not to the Senate, unless in the above-mentioned case of a deadlock between the House of Representatives and the Senate, when he may dissolve both Houses simultaneously.[2] Apart from these restrictions, it is in his discretion when to dissolve the House of Representatives. The Governor-General acts generally on the advice of his Ministers. But sometimes it will be expedient to refuse a dissolution. Each case has to be determined by its circumstances. "The principle which has been acted upon is that with the short Parliaments in the Colonies, a dissolution should, save in special circumstances, be resorted to only when it is clear that in no other way can government be carried on."[3]

(2) He assents to legislation in the name of the Crown. When a proposed law, passed by both Houses of Parliament, is presented to the Governor-General for the Crown's assent, he must declare, according to his discretion, but subject to the Constitution (*i. e.* the provisions of the Commonwealth Act), that he assents in the Crown's name, or that he withholds assent, or that he reserves the law for the Crown's pleasure. He may return any proposed law with suggested amendments to the House whence it originated.[4] The Governor-General ought not to assent to any law which it is beyond the power of the Federal Parliament to pass. An assurance of competency is usually given by the Law Officers, *e. g.* the Attorney-General; but if he is not satisfied, he may seek advice from the Law Officers in England through the Colonial Secretary. But in that case the matter must not be a purely local one.[5]

(3) He recommends money votes. A vote, resolution, or proposed law for the appropriation of revenue or moneys cannot be passed unless the purpose of the appropriation has in the same session been recommended by message of the

[1] Sec. 5. [2] Sec. 57. See p. 67 above.
[3] Harrison Moore, *Commonwealth of Australia*, p. 95.
[4] Sec. 58.
[5] See Jenkyns, *British Rule and Jurisdiction beyond the Seas*, pp. 175–6.

Governor-General to the House in which the proposal originated.[1]

(4) He has the power of pardon. Section 8 of the Instructions to the Governor-General dated October 29, 1900, in which this power is granted, provides that the Governor-General shall not in any case, except where the offence has been of a political nature, make it a condition of any pardon or remission of sentence that the offender shall be banished from, or shall absent himself from the Commonwealth. In capital cases the Governor-General is directed to take the advice of the Executive Council, and in other cases the advice of one, at least, of his Ministers. In any case affecting imperial interests or the interests of any country or place beyond the jurisdiction of the Government of the Commonwealth, the Governor-General must, before deciding as to either pardon or reprieve, take those interests specially into his own personal consideration in conjunction with the advice taken.

(5) He is the Commander-in-Chief of the Forces.[2] We have already seen how the position of a Governor in regard to the Regular Forces is defined by the Colonial Office Regulations.[3] The Governor-General is in the same position. But in self-governing colonies forces locally raised and supported are subject to the Government of the colony. The local Ministry is responsible to the local Parliament for their organization and control.

The Executive Council. There is a Federal Executive Council to advise the Governor-General in the government of the Commonwealth, the members of which are chosen and summoned by the Governor-General and sworn as Executive Councillors. They hold office at his pleasure.[4] The Ministers of State, that is, the persons appointed by the Governor-General to administer such Departments of State of the Commonwealth as the Governor-General in Council may establish, are members of the Federal Executive Council, *and must also be members of the Senate or the House of*

[1] Sec. 56.
[2] Sec. 68.
[3] See p. 36 above.
[4] Sec. 62.

Representatives.[1] They are not to exceed seven in number, until Parliament otherwise provides.[2] The following Departments of State have been established, viz :—

The Department of External Affairs.
The Attorney-General's Department.
The Department of Home Affairs.
The Department of the Treasury.
The Department of Trade and Customs.
The Department of Defence.
The Postmaster-General's Department.

The Cabinet System. Cabinet government is in Great Britain a matter of custom and not of law. Although it is not directly recognized in the Commonwealth Act, yet that Act provides, as is apparent from the preceding paragraph, for an organic connection between the Ministers and Parliament by establishing a Parliamentary Executive.[3] But it stops short there, leaving the rest to Australian custom and practice. In practice the Governor-General in appointing his Ministers of State is guided by the well-known English constitutional custom. The Ministers chosen are selected from that party which possesses the confidence of Parliament, more especially of the House of Representatives. The leading member of that party is asked by the Governor-General to form a Ministry, and the Governor-General accepts as Ministers of State those selected by him. Professor Harrison Moore points out two points of difference between Australian and English practice. "In England, the Cabinet and the Ministry are not identical bodies, the latter includes a large number of officers 'liable to retire upon political grounds' (to use an expression common in the colonies) who are able to sit in Parliament.[4] In Australia there are no Ministers outside the Cabinet. . . . The other point of difference between English

[1] Sec. 64. [2] Sec. 65.

[3] A Parliamentary Executive is an Executive appointed and dismissed by Parliament. See Dicey, *Law of the Constitution*, Appendix, Note III.

[4] For example, the English Attorney-General is a member of the Ministry but not of the Cabinet.

and Australian practice is the existence of what are sometimes called 'honorary Ministers' or 'Ministers without a portfolio' in the colonies. No constitutional rule seems to be more firmly established in England than that which, treating the Ministry as a body of departmental chiefs, confines it, to adopt Addington's description of the Cabinet, to the persons 'whose responsible situations in office require their being members of it.' . . . In Australia, on the other hand, every Cabinet includes from one to three members who hold no office and receive no salary." [1] In the first Cabinet formed in the Commonwealth there were two such members. A third difference may be noticed in connection with the Commonwealth. It would appear that members of Parliament, accepting Cabinet office, need not retire and seek re-election.[2]

The Judicature. The judicial power of the Commonwealth is vested in a Federal Supreme Court, called the High Court of Australia, which was created by an Act of the Federal Parliament in 1903. It consists of a Chief Justice and two Justices. Power was given to the Federal Parliament by the Commonwealth Act to create other federal courts, and to invest other courts with federal jurisdiction.[3] The Justices of the High Court and of other federal courts are appointed by the Governor-General in Council. They cannot be removed except by the Governor-General in Council, on an address from both Houses of Parliament in the same session, praying for such removal on the ground of proved misbehaviour or incapacity. Their remuneration, fixed by Parliament, is not to be diminished during their continuance in office.[4]

Appellate Jurisdiction of the High Court. The High Court determines, and its judgment is final in appeals from (1) any Justice or Justices exercising the original jurisdiction of the High Court; (2) any other federal court, or court exercising federal jurisdiction, or the Supreme Court of any State, or any other court of any State from which at

[1] *Commonwealth of Australia*, pp. 227–8. [2] Secs. 44–5.
[3] Sec. 71. [4] Sec. 72.

the establishment of the Commonwealth an appeal lay to the Judicial Committee of the Privy Council; (3) the Inter-State Commission on questions of law only.[1] The Inter-State Commission is a body, the members of which are appointed by the Governor-General in Council, having such powers of adjudication and administration as Parliament deems necessary for the execution and maintenance within the Commonwealth of the provisions of the Act relating to trade and commerce, and of all laws made thereunder.[2] The Appellate Jurisdiction of the High Court is subject to such variations and exceptions as Parliament prescribes. But Parliament cannot prevent the High Court from determining any appeal from the Supreme Court of a State in any matter in which at the establishment of the Commonwealth an appeal lay from such Supreme Court to the Judicial Committee of the Privy Council.[3] We have already noted the limitation of appeals to the King in Council.[4] The Commonwealth of Australia Judiciary Act of 1903 provides that in matters of Federal jurisdiction there shall be no appeal from the State Courts to the Privy Council except through and by leave of the High Court of Australia.

Original Jurisdiction of the High Court. The High Court has original jurisdiction in all matters (1) arising under any treaty; (2) affecting consuls or other representatives of other countries; (3) in which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party; (4) between States, or between residents of different States, or between a State and a resident of another; (5) in which a writ of mandamus (*i. e.* an order to perform his duty) or prohibition or an injunction is sought against an officer of the Commonwealth.[5] By the Commonwealth Judiciary Act of 1903, the Federal Parliament has added additional original and exclusive jurisdiction in certain matters, under powers conferred upon it by section 76 of the Commonwealth Act.

[1] Sec. 73. [2] Secs. 101–3. [3] Sec. 73.
[4] See p. 27 a [5] Sec. 75.

Parliament may make laws conferring rights of action against the Commonwealth or a State in respect of matters within the judicial power.[1] Trial by jury is prescribed on indictment for any offence against any law of the Commonwealth, and every such trial is to be held in the State where the offence was committed. If the offence was not committed in any State, the trial is to be held at the place or places prescribed by Parliament.[2]

The Commonwealth and the States. The Constitution of each State of the Commonwealth is, subject to the Act, to continue as at the establishment of the Commonwealth, or as at the admission or establishment of the State, as the case may be, until altered in accordance with the Constitution of the State.[3] The several States retain their powers of legislation, except those exclusively vested by the Act in the Parliament of the Commonwealth or withdrawn from the States.[4] There is a similar saving in the case of State laws in force in the States.[5] States may surrender territory which thereupon becomes subject to the exclusive jurisdiction of the Commonwealth.[6] On the imposition of uniform duties of customs (which was effected by the Customs Act, 1901, of the Federal Parliament), trade within the Commonwealth was to be free.[7] But States may levy on imports or exports, or on goods passing into or out of the State, *such charges as may be necessary for executing the inspection laws of the State.* The net produce of such charges is for the use of the Commonwealth, and the Federal Parliament may annul any such inspection laws.[8] All intoxicating liquors passing into any State or remaining therein for use, consumption, sale, or storage, are to be subject to the laws of the State.[9] A State cannot, without the consent of the Federal Parliament, raise naval or military forces ;[10] but the Commonwealth is to protect every State against invasion, and, on the application of the Executive Government of a State, against internal disturb-

[1] Sec. 78. [2] Sec. 80. [3] Sec. 106. [4] Sec. 107.
[5] Sec. 108. [6] Sec. 111. [7] Sec. 92. [8] Sec. 112.
[9] Sec. 113. [10] Sec. 114.

ance.[1] A State cannot impose any tax on the property of the Commonwealth, unless it receive the assent of the Federal Parliament, nor can the latter tax the property of a State.[2] A State is not to coin money, nor make anything but gold and silver a legal tender in payment of debts.[3] Every State is to make provision for the detention in its prisons of offenders against the laws of the Commonwealth.[4] Lastly, we may note that the Commonwealth is expressly forbidden to legislate in respect of religion, *e.g.* by establishing any religion, or by imposing any religious observance or test, or by prohibiting the free exercise of any religion.[5]

New States. New States may be admitted or established by the Federal Parliament upon such terms, including the extent of representation in either House, as it thinks fit.[6] It may also make laws for the government of any territory surrendered to it, or placed by the Crown under its authority, or otherwise acquired by the Commonwealth.[7] With the consent of the Parliament of a State and the approval of the electors of the State voting upon the question, the Federal Parliament may increase, diminish, or otherwise alter the limits of the State, upon such terms as may be agreed on, and may, with the like consent, make provision respecting the effect or operation of any such alteration of territory in relation to any State affected.[8] A new State may be formed by separation of territory from a State, but only with the consent of the Parliament of that State; and a new State may be formed by the union of two or more States or parts of States, but only with the consent of the Parliaments of the States affected.[9]

Alteration of the Constitution of the Commonwealth. Provision is made for the alteration of the Constitution and for the machinery by which it is to be carried out.

[1] Sec. 119. [2] Sec. 114. [3] Sec. 115.
[4] Sec. 120. [5] Sec. 116. [6] Sec. 121.
[7] Sec. 122. British New Guinea has been handed over by the Crown to the Commonwealth. [8] Sec. 123. [9] Sec. 124.

The proposed law for the alteration must be passed by an absolute majority of each House of Parliament, and not less than two nor more than six months after its passage through both Houses it must be submitted in each State to the electors qualified to vote for the election of members of the House of Representatives.

But if either House passes any such proposed law by an absolute majority, and the other House rejects or fails to pass it, or passes it with any amendment to which the first-mentioned House will not agree, and if after an interval of three months the first-mentioned House in the same or the next session again passes the proposed law by an absolute majority with or without any amendment made or agreed to by the other House, and such other House rejects or fails to pass it, or passes it with any amendment to which the first-mentioned House will not agree, the Governor-General may submit the proposed law as last passed by the first-mentioned House, and either with or without any subsequent amendments agreed to by both Houses, to the electors in each State qualified to vote at the election of the House of Representatives.

When the proposed law is submitted to the electors, the vote is to be taken in the manner prescribed by Parliament. If in a majority of the States a majority of the electors voting approve the proposed law, and if a majority of all the electors voting also approve the proposed law, it is to be presented to the Governor-General for the Crown's assent.

No alteration diminishing the proportionate representation of any State in either House of Parliament, or the minimum number of representatives of a State in the House of Representatives, or increasing, diminishing, or otherwise altering the limits of the State, or in any manner affecting the provisions of the Constitution in relation thereto, is to become law except with the approval of the majority of the electors voting in that State.[1]

The Franchise. We have seen that the qualification

[1] Sec. 128.

of electors of senators and of members of the House of Representatives was to be in each State that which was prescribed by the law of the State as the qualification of electors of the more numerous House of Parliament of the State.[1] This was necessarily the franchise at the first election of the Federal Parliament. But the Federal Parliament had power to alter the franchise. It was highly necessary to make a uniform franchise throughout the Commonwealth. So in 1902 the Parliament passed the Commonwealth Franchise Act. By this Act the qualifications of electors of senators and of members of the House of Representatives are these:—Electors must not be under twenty-one years of age, and must have resided in Australia for at least six months continuously. They must be British subjects, either natural born or duly naturalized. Their names must be on the electoral roll. They may be either male or female, married or unmarried. The franchise is thus a broad democratic one. But all insane persons, or persons attainted of treason, or persons convicted of an offence and under sentence, or persons subject to be sentenced for one year or longer under a law of any part of the Crown's dominions, cannot vote. No aboriginal native of Australia, Asia, Africa, or the islands of the Pacific is entitled to have his name placed on the electoral roll, unless he is so entitled under the Constitution.

Naval and Military Defence. The naval and military defences were transferred from the States to the Commonwealth.[2] In 1903 the Commonwealth Parliament passed a Naval Agreement Act. That Act confirms an agreement which was entered into between the British Admiralty on the one hand and the Australian Commonwealth and New Zealand on the other hand. In consideration of the British Government providing an increased naval force on the Australian station, consisting of (*a*) one first-class armoured cruiser, (*b*) two second-class cruisers, (*c*) four third-class cruisers, (*d*) four sloops of war, and (*e*) a Royal Naval

[1] See p. 62 above. [2] Sec. 69

Reserve, the Commonwealth has agreed to contribute an annual sum of not less than £200,000 towards the maintenance of these naval forces.

The military forces, before the establishment of the Commonwealth, consisted of the militia and volunteers which were formerly raised by the different States of the Commonwealth. In New South Wales the Governor was authorized to raise such number of men as the Parliament might from time to time provide for.[1] The forces so raised were to be subject to the British Army Act. In Queensland and South Australia the local forces consisted of all British inhabitants, between specified ages, and with certain exemptions, who were made liable to military service.[2] There was a similar provision in Tasmania.[3] But no such compulsory service was ever enacted in Western Australia or Victoria, and the militia was in fact recruited throughout the Commonwealth by voluntary enlistment. Each of the States had a volunteer force. All these forces are now subject to the Government of the Commonwealth, and the Minister of Defence is responsible to the Federal Parliament for their maintenance and regulation. But the Commonwealth Parliament passed a Defence Act in 1903, providing that all males, with certain exceptions, should be liable to serve, and were to be classified in divisions. Such Defence Force is to be kept up by voluntary enlistment, except in case of emergency. The Governor-General has power to call out any part of the Defence Force for active service anywhere within the Commonwealth in time of emergency. The Permanent Force is liable to serve *outside* the Commonwealth in time of emergency, but the Citizen Force is not so liable unless they voluntarily agree to do so. It is estimated that during war time nearly 1,000,000 men will be available. Although this Act can hardly be called a

[1] New South Wales Act, No. 19 of 1871.

[2] South Australia Defences Act, 1895, No. 643; Queensland Act, 48 Vict., No. 27.

[3] Tasmania Act, No. 16 of 1885.

conscription one, yet it goes in that direction. It may be observed that the Australian Commonwealth has just lately, in last year (1904), appointed a Committee to consider (1) the steps necessary to be taken towards making military service compulsory on all youths, (2) at what age it should be enforced, and (3) the amounts to be contributed by the various States towards this purpose.

CHAPTER VIII

The States of the Australian Commonwealth

Subject to the provisions of the Commonwealth of Australia Constitution Act of 1900, discussed in the last chapter, the six States composing the Commonwealth remain self-governing colonies. The Governor of each State is directly appointed by the Crown, and he (together with the Crown) has alone the right of assenting or refusing assent to laws passed by the Parliament of the State. The Governor-General has no veto over such laws.

Though differing in details, the constitutions of the six States present the same general features.[1] Our plan will therefore be, as in the case of the Crown colonies, to examine their general structure.

Parliament. The legislative power in each State resides in the Governor as representing the Crown, and the Parliament, which consists of two Chambers or Houses. The Upper House is always called the Legislative Council. The Lower House, which is the more popular chamber, is called the Legislative Assembly in New South Wales, Victoria, Queensland, and Western Australia. But in South Australia and Tasmania it is known as the House of Assembly. In each State Parliament must meet every year.

[1] See 18 & 19 Vict. cc. 54 & 55; 53 & 54 Vict. c. 26; South Australia Constitution Act, No. 2 of 1855 6; Order in Council of June 6, 1859, relating to Queensland, and Queensland Act, 31 Vict., No. 38; Tasmania Constitution Act, 18 Vict. No. 17. The Constitution Act Amendment Acts passed since by the different States tend to further uniformity of constitution.

Nominated Legislative Councils. The Legislative Council in New South Wales and in Queensland consists of members nominated for life by the Governor, with the advice of the Executive Council. There is no limit to the number of such members, except that in New South Wales it must not be less than twenty-one, and that in both States at least four-fifths of the members must be non-official members, that is, persons holding no place of profit under the Crown.[1] No property qualification is required. But a member must be a British subject by birth or naturalization and at least twenty-one years of age.[2] He can resign by a notice in writing sent to the Governor.[3] A member vacates his seat by becoming (1) absent from the Legislative Council for two consecutive sessions without its permission, or (2) a subject of an alien power, or (3) bankrupt or insolvent, or (4) attainted of treason, or convicted of felony or any infamous crime.[4] The Governor appoints the President, who may take part in debates.[5] But the elective Legislative Councils choose their own President.

Elected Legislative Councils. In Tasmania, Victoria, Western Australia and South Australia the Legislative Council is elected. Each member holds his seat for six years. In each of these States a member must be of the age of thirty years or more, and must be a British subject by birth or naturalization. In all cases residence of some duration in the State is also required. Thus in Victoria residence for ten years is necessary, while in South Australia a member must have resided for three years, and in Western Australia for two. In Tasmania a member must have either resided for five years, or for at least two years immediately pre-

[1] Sec. 2 of the Constitution Act, scheduled to 18 & 19 Vict. c. 54.

[2] *Ibid.* [3] *Ibid.* sec. 4. [4] *Ibid.* sec. 5.

[5] *Ibid.* sec. 7. The above references are to the New South Wales Constitution Act. For Queensland, see Order in Council of June 6, 1859 (confirmed by 24 & 25 Vict. c. 44, sec. 3), and the Queensland Act, 31 Vict. No. 38.

ceding election. Victoria is the only State which imposes a property qualification. To be qualified for membership of the Victorian Legislative Council a candidate must possess, or be beneficially entitled to a freehold estate in Victoria of the net annual value of £100 for one year previous to his election.[1] The disqualifications for membership and the occasions on which members vacate their seats are generally the same as in the Legislative Assembly or House of Assembly in the various States. These are discussed below.

The Franchise for the Elected Legislative Councils. The members of the Legislative Councils in the four States are elected by ballot on a franchise which includes a property qualification. Women have a vote in South Australia and Western Australia, and in Western Australia every elector can vote for each candidate, not exceeding three in number, for the same electoral province.[2] All electors must be British subjects by birth or naturalization, and of full age. They must not be under any legal disability, *e.g.* insane, in prison, etc. Residence for some time in the State is also required. Thus in Western Australia an elector must have resided for five years. In South Australia he must have been on the electoral roll for six months. One year's residence is sufficient in Victoria.[3] They must have the following property or other qualifications, namely :—

(1) A freehold estate in land of the clear capital value of £100 (in Western Australia), £50 (in South Australia), or of the annual value of £10 (in Tasmania and Victoria) ; *or*

(2) A leasehold estate of the annual value of £25 (in Victoria and Western Australia) or £20 (in South Australia) ; *or*

[1] Victoria Constitution Act Amendment Act, 1890, sec. 35.

[2] South Australia Act of 1894, No. 613; Western Australia Constitution Acts Amendment Act of 1899.

[3] Victoria Constitution Act Amendment Act of 1890, secs. 43, 51.

(3) Occupation of a dwelling-house or land of the annual value of £30 (in Tasmania) or £25 (in South Australia, Victoria, and Western Australia); *or*

(4) A lease or licence from the Crown to depasture, occupy, cultivate or mine upon Crown lands (in Western Australia) of not less annual value than £10; *or* they must

(5) Be on a Municipal roll or the roll of a Roads Board (in Western Australia) for property of the annual rateable value of not less than £25; *or*

(6) Be (while resident in Tasmania or Victoria) a graduate of a British university, a barrister or solicitor, a qualified doctor, an officiating clergyman, an officer or retired officer in the army or navy, an Associate of Art in Tasmania, or a matriculated student at Melbourne University.[1]

Number of members and duration of the Legislative Council. The nominated members of the Legislative Council of New South Wales and Queensland number at present fifty-eight and thirty-seven respectively. The Legislative Council in Tasmania consists of eighteen members, in Victoria of forty-eight, in Western Australia of thirty, and in South Australia of twenty-four. In Tasmania the members are returned for fifteen electoral districts, two districts returning two each; in Victoria for fourteen provinces, of which six return four each, and eight return three each; in Western Australia for ten electoral provinces, each returning three members; and in South Australia for four electoral districts, each returning six members.

The Legislative Council does not dissolve.[2] The members of an elected Legislative Council retire gradually, at the expira-

[1] Victoria Constitution Act Amendment Act of 1890, secs. 43-6, 50; Tasmania Constitution Act Amendment Act of 1896.

[2] It may, in certain circumstances, be dissolved in South Australia. See p. 93 below.

tion of fixed periods of either two years (as in Victoria or in Western Australia) or three years (as in Tasmania or South Australia), the senior members (usually to the extent of one-third of the whole Legislative Council) withdrawing at each period, but being eligible for re-election. The initial difficulty of assigning priority was overcome in different ways, in some instances by the happy device of drawing lots for order of seniority in the first instance.[1] The members thus retire now in rotation on the expiry of their tenures. In the nominated Legislative Councils, vacancies by death may or may not be filled up. Although the Legislative Council has a continuous existence, it can of course be prorogued, subject to the rule that there must be a session of Parliament once at least every year. In South Australia and in Tasmania the members of the Legislative Council are paid. This is not the case in the other States.

The Legislative Assembly or House of Assembly. The Legislative Assembly of New South Wales consists, in virtue of an Electoral Act of 1893, of one hundred and twenty-five members returned for the same number of electoral districts, each being represented by one member. In Queensland it is composed of seventy-two members elected for sixty-one districts, of which fifty return one member each, and eleven return two members each.[2] The Legislative Assembly in Victoria has now ninety-five members returned for eighty-four electoral districts, eleven of which have two members, and the rest one each;[3] and in Western Australia there are fifty electoral districts returning one member each to the Legislative Assembly.[4] In South Australia and Tasmania we saw that the popular chamber is called the House of Assembly.

[1] Jenks, *History of the Australasian Colonies*, p. 238.

[2] Electoral Districts Act, No. 10 of 1887, as amended by the Electoral Districts Act, 1892. *Cf.* the Queensland Constitution Act, 1867, 31 Vict. No. 38.

[3] 52 Vict. No. 1008, and Victoria Constitution Act Amendment Act, 1890, sec. 122, and schedule 17.

[4] Western Australia Constitutions Act Amendment Act, 1899.

In South Australia it is composed of forty-two members representing thirteen districts, of which two districts return four members each, nine districts three members each, and the other two five and two members respectively.[1] The House of Assembly of Tasmania consists of thirty-five members representing thirty-five electorates.[2]

No property qualification is required for membership of the Legislative Assembly or House of Assembly. But every member must be a British subject by birth or naturalization, of full age, and an elector or entitled to become one. Residence in the State for some time is generally necessary. Thus in Western Australia a candidate must have resided two years, and this is also the rule in Victoria, in practice at all events, if not in strict law.[3] New South Wales only requires one year's residence. No residence is required in South Australia, except that a candidate must have been on the electors' roll for six months. All the State Parliaments have passed laws disqualifying members of the Commonwealth Parliament from being members of the State Parliament.[4] Generally speaking, the disqualifications for membership both of the Legislative Assembly or House of Assembly and of the Legislative Council (where elected) are similar in all the States, and correspond more or less to those for the Commonwealth Parliament. No person can be chosen or continue to sit as a member in either House if he be or become

(1) a member of the other House; *or*
(2) under allegiance to a foreign power; *or*
(3) bankrupt or insolvent; *or*
(4) attainted of treason or convicted of felony; *or*

[1] Act, No. 779 of 1901.

[2] 18 Vict. No. 17; 34 Vict. No. 2; 49 Vict. No. 12; and 1 Edw. VII. No. 57.

[3] Jenks, *Government of Victoria*, p. 253.

[4] See, for instance, Western Australia Constitution Acts Amendment Act, 64 Vict. No. 5, secs. 2, 3; South Australia Constitution Amendment Act, 1899; New South Wales Federal Elections Act, No. 73 of 1900, sec. 7.

(5) a person holding a place of profit under the Crown, other than in the army or navy or as a Cabinet Minister; *or*
(6) insane; *or*
(7) a clergyman; *or*
(8) a contractor with the Government.

Members on becoming Cabinet Ministers (with a portfolio, *i. e.* as chiefs of some Department of State) generally vacate their seats, except in South Australia, but are eligible for re-election. In South Australia women are eligible for membership of either House of Parliament. Members also vacate their seats by absence without permission. The usual disqualifying period is one session. But in South Australia absence for one month, and in Western Australia absence for two consecutive months, is sufficient.[1] A member may resign his seat by notice in writing addressed to the Governor (for the Legislative Council), or to the Speaker (for the Legislative Assembly or House of Assembly). But in Western Australia a member of the Legislative Council resigns his seat by a written notice addressed to the President of that Council.[2]

The Legislative Assembly or House of Assembly elects its Speaker from among its own members, and its duration is in every State three years, unless sooner dissolved by the Governor. Except in Western Australia, the members are paid an annual salary of £300 (in New South Wales, Victoria, and Queensland), £200 (in South Australia), and £100 (in Tasmania).

The Franchise for the Assembly. The Franchise is a democratic one, and voting is always by ballot. In South Australia voting by letter is allowed in certain cases. In every State, any man, who is of full age and a British subject by birth or naturalization, is entitled to a vote, pro-

[1] South Australia Constitution Act Amendment Act, 1901, sec. 21; the Western Australia Constitution Act, 1890 (scheduled to 53 & 54 Vict. c. 26), sec. 29.

[2] Western Australia Constitution Act, 1890 (scheduled to 53 & 54 Vict. c. 26), sec. 59.

vided he fulfils certain varying conditions of residence. The qualifying period of residence is six months (in New South Wales, South Australia, Western Australia, and Queensland), and one year (in Victoria and Tasmania). In New South Wales and South Australia no other qualification is allowed, property qualifications having been abolished completely. In these States the system is "one man one vote," *i. e.* there is no plural voting. A man can only vote once and in only one electoral district.[1] But plural voting exists in the election of members of the Legislative Council. In Victoria the "one man one vote" principle also obtains. But in addition to being on the electoral roll of the district in which he resides, a man may also be on the roll in various electoral districts in respect of qualifications in regard to property situated therein. Such property qualifications are the possession of a freehold estate of the net capital value of £50, or the clear annual value of £5, or being enrolled as a ratepayer in a municipal district in respect of rateable property.[2] But although thus entitled to vote in *any one* of different electoral districts, he can only vote in *one* and only *once* therein.[3] In Queensland and Western Australia plural voting is still the rule. In addition to voting where he resides, an elector may also vote in any number of electoral districts in which he may have the necessary property qualifications. These latter consist in having property, either freehold or leasehold, or a licence to depasture land, of a certain value. Thus in Western Australia a person is entitled to a vote in each district where (1) he possesses a freehold estate of the net capital value of £50, or (2) rents a house of the net annual value of £10, or (3) holds a lease or licence from the Crown to depasture, occupy, cultivate, or mine Crown lands at an annual rent of £5, or (4) is on

[1] New South Wales Parliamentary Electorates and Elections Act, 1893; South Australian Electoral Code, 1896.

[2] Victoria Constitution Act Amendment Act, 1890, secs. 128–130, 135.

[3] Victoria Constitution Act Amendment Act, 1899.

the electoral roll of a Municipality or Roads Board in respect of property situated within the district.[1] The franchise has been extended to women of adult age, whether married or unmarried, with the necessary electoral qualifications, in the respective States of New South Wales,[2] South Australia, Tasmania,[3] and Western Australia. Aboriginal natives of Australia, China, the South Seas and India can only exercise the franchise in Queensland in respect of a freehold qualification,[4] and the same is the case in Western Australia in regard to aboriginal natives of Australia, Asia, or Africa.[5]

Australians and alien races. Men of colour are despised in Australia, particularly Chinamen.[6] "Nothing will so rapidly bring together an Australian crowd as the rumour that Chinamen or rabbits are likely to be landed from a ship, and the one class of intruder is about as popular as the other."[7] Indeed the various States have passed laws prohibiting or otherwise regulating the immigration of Chinamen,[8] although Britain is under a treaty obligation with China to allow freedom of immigration to Chinese subjects in her dominions. This once led to friction between the Home and Australian authorities, when China complained of Acts passed in New South Wales and Victoria excluding Chinese immigration.[9] But the Home Government has

[1] Western Australia Constitution Acts Amendment Acts, 1899 and 1900; Queensland Consolidated Election Acts, 1885 to 1897.

[2] Franchise Act of 1902.

[3] See the Electoral Act, No. 57 of 1901.

[4] Queensland Act, 64 Vict. No. 5, sec. 5.

[5] Western Australia Act, No. 14 of 1894, secs. 12 and 21. The same provisions still remain in the Constitution Acts Amendment Act, 1899.

[6] See p. 77 above as to their position in the Commonwealth franchise.

[7] Dilke, *Problems of Greater Britain*, p. 213.

[8] See the Queensland Act, No. 2 of 1890. An Act of the Federal Parliament (No. 12 of 1901) stipulates that only white labour shall be employed in the carriage of Australian mails.

[9] See the Blue Book of July 1888, relating to Chinese immigration into the Australasian Colonies.

ultimately deferred to colonial opinion, just as it did in the case of the tariff question. Every colony used to be bound by treaties made by Britain with other countries, which provided that no discriminating duties should be imposed on the produce of such countries imported into any part of the British dominions. But as the self-governing colonies wanted to be free from such obligation, the British Government denounced in 1897 the treaties containing such provisions.[1] All this is but evidence of the present constitutional rule that *in any treaty entered into between Britain and any foreign country, which affects the internal law of a self-governing colony, such self-governing colony will not be included without its own consent, and a right will be reserved to exclude the operation of the treaty from any self-governing colony which does not consent.*

Privileges of Parliament. We have already seen that the *Lex et Consuetudo* of the British Parliament do not apply to the legislatures in the colonies, and that the powers incident to or inherent in them are only such as are necessary to their existence and the proper exercise of their functions, and do not extend to justify *punitive* action,[2] unless such power is expressly given or authorized in their instruments of constitution. The Constitution Acts of the various States have generally given authority to the Parliaments to define their privileges, immunities, and powers, always providing that they must not exceed those for the time being (*i. e.* at the date of the passing of the Constitution Act of any colony) of the British House of Commons and its members.[3]

[1] *Cf.* the Australian Customs Duties Act of 1894 (58 & 59 Vict. c. 3). The treaties so denounced were with Belgium and Germany. Canada led the way in this matter. See Bourinot's *Canada under British Rule*, pp. 260, 270.

[2] See p. 51 above.

[3] See sec. 36 of the Western Australia Constitution Act, 1890 (scheduled to 53 & 54 Vict. c. 26); Victoria Constitution Act, 1855 (scheduled to 18 & 19 Vict. c. 55), sec. 35; New South Wales Constitution Act, 1855 (scheduled to 18 & 19 Vict. c. 54), sec. 35; South Australia Constitution Act, No. 2 of 1855-6, sec. 35.

Thus the Constitution Act Amendment Act, 1890,[1] of Victoria declared that the Legislative Council and the Legislative Assemblies, and the committees and members thereof, were to have the privileges, immunities, and powers of the British House of Commons as they existed at the time of the passing of the Victorian Constitution Act in 1855. Such privileges included the power to punish a person for contempt of either House by imprisonment or expulsion.[2] An instance of a similar declaration will be found in the Western Australian Act for "defining the Privileges, Immunities and Powers of the Legislative Council and Legislative Assembly of Western Australia respectively."[3] In section 51 of the Constitution Acts Amendment Act, 1899, of Western Australia it is further provided that no action lies against the officials of either House, or constables acting under their authority, for anything done or purporting to be done under the authority of the standing rules or resolutions of the House made in virtue of the Act mentioned in the previous sentence. In the States publication of parliamentary reports and proceedings under the authority of Parliament are by local Acts absolutely privileged.[4] The Parliaments of the States have thus taken care to supply the defect of having no *punitive* powers by assuming the privileges of the British Parliament, which include such powers. But this was only done in virtue of express authority conferred upon them by the British Parliament.

Powers of either House of Parliament. Each House of Parliament in the State makes rules and standing orders to regulate its own internal procedure. Either House may introduce proposed laws. But money Bills, *i. e.* proposed laws dealing with taxation or determining the manner in which the revenues or moneys of the State are to be spent, must be originated in the Legislative Assembly or House of Assembly. This is enacted in the various Constitution Acts

[1] Sec. 10. [2] See p. 51 above. [3] No. 4 of 54 Vict.
[4] See, for example, Victoria Constitution Act Amendment Act of 1890, sec. 343.

of the States which make it a *law* of the constitution instead of a *convention* or *custom*, as is the rule in the United Kingdom, that money Bills must originate in the House of Commons. Thus section 66 of the Western Australian Constitution Act, 1890,[1] provides that all Bills for appropriating any part of the Consolidated Revenue Fund of the State, or for imposing, altering, or repealing any rate, tax, duty, or impost, must originate in the Legislative Assembly. At the same time it is enacted that no money Bill, vote, or resolution is to be passed or adopted, unless recommended by message of the Governor to the Legislative Assembly.[2] This latter rule also prevails in all the other States.[3]

So far everything is clear. But the question of the constitutional powers of the Legislative Councils as to *rejecting* or *amending* money Bills passed by the Lower Houses has been a thorny subject in Australian politics. *According to strict law* the Legislative Council can *reject* money Bills sent up to it by the Legislative Assembly or House of Assembly. Section 56 of the Constitution Act of Victoria, 1855,[4] expressly enacts that "all Bills for appropriating any Part of the Revenue of Victoria, and for imposing any Duty, Rate, Tax, Rent, Return, or Import, shall originate in the Assembly, and may be *rejected*[5] but *not altered*[5] by the Council." The South Australian Act[6] made no special provision in this respect, except that it prohibited either House from passing money Bills, or votes for any purpose not recommended by message from the Governor to the House of Assembly. This implied a power of *amending* as well as of *rejecting* money Bills on the part of the

[1] Scheduled to 53 & 54 Vict. c. 26.

[2] *Ibid.* sec. 67.

[3] See, for example, secs. 1 and 54 of the New South Wales Constitution Act, 1855 (scheduled to 18 & 19 Vict. c. 54); South Australia Constitution Act, No. 2 of 1855 6; Queensland Constitution Act, 31 Vict. No. 38, secs. 2, 18.

[4] Scheduled to 18 & 19 Vict. c. 55.

[5] These words are not in italics in the Act.

[6] No. 2 of 1855–6.

Legislative Council. "The Compact of 1857" between the Legislative Council and House of Assembly recognizes this. The former was allowed to make *suggestions* with regard to money Bills and either to *reject* or assent to them. In New South Wales and Tasmania the power of *rejection* is also implied in their Constitution Acts,[1] which only empower both Houses of Parliament to legislate jointly. In Western Australia both a power of *rejecting* and of *amending* money Bills is given to the Legislative Council. According to the Western Australia Constitution Acts Amendment Act of 1899, section 46, when a money Bill has been sent up to the Legislative Council, it may at any stage return such Bill, with a message requesting the omission or amendment of any items or provisions therein, and the Legislative Assembly may, if it thinks fit, agree to such omissions or amendments, with or without any modifications. In Queensland a dispute between the two Houses over their respective powers as to money Bills was ultimately referred in 1886 to the Judicial Committee of the Privy Council, who reported to the Queen in Council, (1) that the Queensland Constitution Act of 1867 did not confer on the Legislative Council powers co-ordinate with those of the Legislative Assembly in the amendment of all Bills including Money Bills, and (2) that the claims of the Legislative Assembly, as set forth in their message of November 12, 1885, were well founded. The claims amounted to this—that the legal functions of the Legislative Council were similar to the functions of the House of Lords, and that the right of taxation and controlling the expenditure of public money rested with the Legislative Assembly. In every State the Legislative Council has thus, according to strict law, the right to reject money Bills. *In Victoria* it has no right to *amend them*, while in the other States it seems to have the *legal* power of amending or *suggesting* amendments. But constitutional *law* and constitutional

[1] New South Wales Constitution Act, 1855 (scheduled to 18 & 19 Vict. c. 54), and Tasmania Constitution Act, 18 Vict. No. 17.

practice[1] have parted company in Australia as well as in Britain. The Assembly has always been trying to oust the Council from having *any control whatever* in the matter of money Bills. But the attempt, however successful it has been in *practice*, has never been so successful in *theory*.

Provisions for deadlocks. The subject of the preceding section naturally leads to the inquiry as to the provisions made for disagreement between the two Houses of Parliament in the State. Only one such provision has been made by law, and that only in South Australia, the most democratic of all the States. In South Australia when a Bill has been twice passed by the House of Assembly, and twice rejected by the Legislative Council or amended in a way to which the House of Assembly will not agree, the Governor *may* either (1) dissolve both Houses, or (2) issue writs for the election of one, or not more than two members of the Legislative Council in each electoral district for returning such members.[2] In the case of the nominated Legislative Councils of New South Wales and Queensland the number of such members might be increased by the Governor. On one occasion this was actually done in New South Wales. "But the home authorities rebuked the Governor, Sir John Young, for lending himself to the scheme, and the principle was laid down that the number of legislative councillors should be limited to what is convenient, and 'that no nominations should ever be made merely for the purpose of strengthening the party which happens to be in power.'"[3]

The Referendum. In this connection we must notice the growing use of the referendum in Australia. The referendum may be briefly described as a reference of a question to the *direct* vote of the electors. We saw that such was made on the question of federation. Each elector

[1] See p. 11 above.

[2] South Australia Constitution Act Amendment Act, 1901, sec. 24. A general election must have intervened between the two passings of the proposed law in the House of Assembly.

[3] Jenkyns, *British Rule and Jurisdiction beyond the Seas*, p. 67.

was asked whether he or she was or was not in favour of the federation of the Australian colonies.[1] In South Australia the referendum was used in 1896 on the important question of religious education, and an overwhelming majority decided in favour of the continuance of the system of education in State schools, and against the introduction of Scriptural instruction in such schools during school hours, or of grants to Denominational schools for secular results. The referendum has been used more than once since then in South Australia. It may probably be used more extensively in the future as a convenient method for solving the problem of deadlocks between the two Houses of Parliament in the Australian States. It seems already an established custom in South Australia.

The Legislative Powers of the State Parliaments. The legislative powers of the State Parliaments are expressed in the widest terms in their various Instruments of Constitution. Thus the first section of the Constitution Act of Victoria[2] confers upon its Parliament the power "to make Laws in and for Victoria in all cases whatsoever." Powers of changing the constitution are also conferred on all the States; but the Commonwealth of Australia Constitution Act[3] has necessarily curtailed the legislative powers of the State Parliaments. The State Parliaments cannot legislate with respect to such topics as are exclusively assigned to the Federal Parliament, and with respect to those matters in which they have a legislative authority *concurrent* with that of the Federal Parliament, their laws, if inconsistent with those of the Commonwealth, are void to the extent of such inconsistency.[4] Subject to these limitations, the State Parliaments retain their original legislative powers.

Powers of Constitutional Change. Whatever doubts may have previously existed as to the powers of some of the State Parliaments to change the constitution, there

[1] See p. 60 above. A referendum is necessary in any alteration of the Constitution of the Commonwealth (p. 76 above).

[2] Scheduled to 18 & 19 Vict. c. 55.

[3] 63 & 64 Vict. c. 12.

[4] See pp. 64–5 above.

seem none now since the passing of the Colonial Laws Validity Act of 1865.[1] But in all the States (except Tasmania) certain conditions must be fulfilled in respect of Bills changing the constitution. These conditions relate principally as to the majorities required for passing such Bills. In Tasmania alone is it the case that Bills altering the constitution are passed in the same manner as ordinary Bills.

In Victoria any Bill, altering the constitution of the Legislative Council or the Legislative Assembly, cannot be presented to the Governor for his assent unless the second and third readings of the Bill have been passed by an absolute majority of the members of the Legislative Council and Legislative Assembly respectively. It must also be reserved by the Governor for the Crown's assent.[2]

Both in Western and South Australia the same is the case, except that in Western Australia such a Bill does not require to be reserved by the Governor for the Crown's assent.[3]

In Queensland a Bill altering the constitution of the Legislative Council must fulfil three conditions: (1) The second and third readings of the Bill must be passed in *each* Chamber with the concurrence of two-thirds of the members thereof; (2) the Bill must be reserved for the Crown's assent; (3) a copy of it must be laid before both Houses of the British Parliament before the royal assent can be given.[4]

In New South Wales, Bills altering the constitution of either the Legislative Council or the Legislative Assembly need only be passed in the usual way, but must satisfy the last two conditions enumerated in the preceding paragraph.[5]

[1] 28 & 29 Vict. c. 63. See p. 57 above.

[2] Sec. 60 of the Victoria Constitution Act, 1855 (scheduled to 18 & 19 Vict. c. 55).

[3] Sec. 73 of the Western Australia Constitution Act, 1890 (scheduled to 53 & 54 Vict. c. 26); the South Australian Constitution Act, No. 2 of 1895–6, sec. 34.

[4] Queensland Constitution Act, 1867, 31 Vict. No. 38, secs. 9, 10.

[5] Secs. 15 and 36 of the New South Wales Constitution Act, 1855 (scheduled to 28 & 29 Vict. c. 54), as amended by the local Act, 20 Vict. No. 10.

In Queensland it may be noticed that the constitution of the Legislative Assembly may be altered in the same way as any other law.

The Executive. The executive power in the various States is vested in the Governor and the Executive Council. The members of the Executive Council are in fact the Ministry for the time being. In Victoria it includes all past Cabinet Ministers, but these are really honorary members and do not attend its meetings.

The Governor. The Governor is still appointed directly by the Crown. But since the establishment of the Commonwealth his powers have been restricted. He may pardon offenders against the laws of the State, but he cannot pardon offenders against the laws of the Commonwealth. Otherwise his powers of pardon and the manner of their exercise are similar to those of the Governor-General of the Commonwealth.[1] He also summons and prorogues Parliament, subject to the provision that Parliament must meet once at least every year. He can dissolve the Legislative Assembly or House of Assembly, but not the Legislative Council, except in South Australia, and there only in the case of a deadlock between the two Houses.[2] He assents or refuses his assent to laws passed by the State Parliament, or reserves them for the Crown's assent. He must reserve the following classes of Bills for the royal assent: (1) divorce Bills; (2) Bills granting lands or other donations to himself; (3) Bills affecting the currency of the State; (4) Bills containing provisions inconsistent with treaty obligations entered into by Britain with other powers; (5) Bills affecting the royal prerogative, or the rights and property of British subjects not resident in the State, or the trade and shipping of the United Kingdom and its dependencies; (6) Bills containing provisions to which the royal assent has been refused, or which have been disallowed by the Crown.[3]

[1] See p. 70 above.

[2] See p. 93 above.

[3] See sec. 7 of the Instructions to the Governor of Victoria, dated October 29, 1900. The Governors of the other States have the same Instructions.

Cabinet Government. The system of responsible government has prevailed in all the Australian States for the last half-century. We have seen that the Commonwealth of Australia Constitution Act of 1900,[1] if not directly, at all events indirectly recognized the Cabinet system of Government by establishing a Parliamentary Executive. The Constitution Acts of the States more or less hint at different features of this system of government. Thus with reference to the composition of the Executive Council mention is made of executive officers "liable to retire *on political grounds*."[2] Again, all appointments to public offices are generally required to be made by the Governor *with the advice of the Executive Council*, and the only appointments which are excepted are the appointments of executive officers "liable to retire *on political grounds*."[3] In South Australia all disbursements out of the State funds, and all appointments and dismissals from public office, must be countersigned by the Chief Secretary, who is one of the Cabinet.[4] But in all the States Public Service Acts exist to prevent wrong dismissals or appointments of civil servants at the hands of the Cabinet. Civil servants hold office as securely in the States as in England. A permanent Civil Service seems indeed necessary to secure continuity of government, and all the colonies have adopted it.

The constitutional rule that members of the Cabinet, or some of them, must be members of the legislature is laid down expressly in the Constitution Acts of Victoria[5] and South Australia. Thus section 32 of the South Australia Constitution

[1] 63 & 64 Vict. c. 12. See p. 71 above.

[2] New South Wales Constitution Act, 1855 (scheduled to 18 & 19 Vict. c. 54), sec. 37; Victoria Constitution Act, 1855 (scheduled to 18 & 19 Vict. c. 55), sec. 37; Tasmania Constitution Act, 1855, 18 Vict. c. 17; South Australia Constitution Act, No. 2 of 1855–6, sec. 39.

[3] *Ibid.* But the Tasmanian Act is silent on this point.

[4] South Australia Constitution Act, No. 2 of 1855–6.

[5] Victoria Constitution Act, 1855 (scheduled to 18 & 19 Vict. c. 55), sec. 18.

Act[1] enacts that the five Ministers of State must be members of the legislature, and makes them *ex officio* members of the Executive Council. The Western Australia Constitution Act of 1890[2] provides that one at least of the five[3] executive offices "liable to be vacated on political grounds" shall always be held by a member of the Legislative Council. The provision in the New South Wales Constitution Act of 1855[4] is that members of the Legislative Assembly must not hold a place of profit under the Crown *except the official members of the Government*. The Tasmanian Constitution Act provides that acceptance of Cabinet office vacates a seat in Parliament. But, as we have previously seen,[5] all Government officials, other than Cabinet Ministers, are excluded from Parliament.

To sum up. Several of the features of the English *constitutional practice* of responsible government are expressly made *laws* in the Australian States. But others are, as in England, left to *custom* or *convention*.

Departments of State. It was incidentally mentioned that each State has a permanent Civil Service. This is divided into different Departments. But the establishment of the Commonwealth has involved the transference of some of these Departments from the States to the Commonwealth.[6] The following are, generally speaking, the chief Departments of the States, viz. :—

The Department of the Chief Secretary or Colonial Secretary.
The Treasury Department.
The Department of the Attorney-General.
The Department of Lands and Agriculture.
The Department of Public Works.

[1] No. 2 of 1855–6.
[2] (Scheduled to 53 & 54 Vict. c. 26), sec. 6.
[3] Increased to six by the Constitution Act Amendment Act of 1896, sec. 13.
[4] (Scheduled to 18 & 19 Vict. c. 54), sec. 18. See also the Queensland Constitution Act, 31 Vict. No. 38, and 48 Vict. No. 29, sec. 1.
[5] See p. 86 above.
[6] See p. 65 above.

The Department of Education.
The Department of Mines.
The Department of Railways.

But in some of the States several of these Departments are conjoined, or separated. Thus in Tasmania there is a separate Department for Agriculture, while the Department of Lands includes that of Public Works. In Western Australia the Department of Railways and of Public Works are conjoined. The Education Department in South Australia includes Industry, and so on. Each Department has a permanent chief, answering to the permanent heads of our official Departments in the United Kingdom. The members of the Cabinet are the chiefs for the time being of one or more of these Departments. They vary in number, South Australia having now only four Cabinet Ministers, namely, the Chief Secretary, the Attorney-General, the Treasurer and Minister of Lands, and the Commissioner of Public Works. Some States have over ten Cabinet Ministers. The Cabinet includes very often Ministers holding no office,[1] and it is said that as a rule a Cabinet without unofficial members is a weak one. It has been suggested to the writer by a colonial friend that the origin of having unofficial members in Australian Cabinets arose in this way. Distances are great in Australia, and very frequently a Minister, say of Lands or of Mines, has to travel far for inspection or other purposes, and may thus be absent for a time from Parliament. Consequently it is advisable to have an extra Minister or two to take his place in Parliament for the time being to answer questions relating to his Department.

It will at once be seen from the enumeration of the chief Departments of State that in Australia the Government undertakes more than the British Government does. The British Government practically confines itself to the three necessary functions of government, the legislative, the executive and the judicial. It does indeed own the post office and telegraphs,

[1] See p. 72 above.

but it goes no further. But the Australian States own land and sell it. They possess and work the railways. There are State schools, and the teachers are civil servants. The State undertakes public works. In South Australia a State bank has existed for the last eleven years. In fact the revenues of the different States are chiefly derived from such sources as the sale and rent of the public lands, the receipts from railways, harbours, and other public works. Taxation seems the least important source of revenue, if we except the customs duties, three-fourths of which are repaid by the Commonwealth to each State.[1] It may be noted that since 1893 to the establishment of the Commonwealth, South Australia imposed heavy duties.

The Judicature. In each State there is a Supreme Court consisting of a Chief Justice and puisne Judges, varying in number from six in New South Wales to two in South Australia and Tasmania. It has both an appellate and an original jurisdiction. When it sits as a Court of First Instance, it is generally represented by a single Judge, and the work is distributed. Thus in New South Wales one of the Judges sits in divorce cases, another in equity cases, and a third presides in bankruptcy and probate. The Chief Justice is the judge in the Vice-Admiralty Court of New South Wales. The Judges of the Supreme Court generally hold sittings, not only in the capital but in the various districts of the State at certain times.[2] In addition to the Supreme Court there are District or County Courts each presided over by a District Court Judge. Generally speaking, these have jurisdiction in civil cases where the amount at stake is not more than £500. Then follow in most States Courts of Quarter Sessions and of Petty Sessions. The latter have jurisdiction in civil cases not involving, as a rule, more than £50. The Court of Quarter Sessions sits as an appellate court in these cases, and

[1] 63 & 64 Vict. c. 12, sec. 87.

[2] See, for instance, the Victoria Supreme Court Act, 1890, secs. 45, 54–5.

has also a limited criminal jurisdiction. In all the important towns there are Stipendiary or Police Magistrates. In Victoria, famed for mines, there is a Court of Mines to determine mining disputes, arising out of mining on Crown lands. The most serious criminal offences are tried by the Supreme Court, the less serious by the Police Magistrates and the other lower courts.

The Judges of the Supreme Court can, as a rule, only be removed from office upon an address from both Houses of the State Parliament to the Governor. But the Governor in Council may temporarily remove a Judge, until the Crown's pleasure be known, for wilful absence without reasonable cause, incapacity, or neglect.[1] The Judges thus hold office during good behaviour. Appeals from the Supreme Court of a State now go to the High Court of the Commonwealth, and not directly to the Privy Council.[2] The original jurisdiction of the State Supreme Court has also been limited to some extent.[3]

[1] Victoria Supreme Court Act, 1890, secs. 13, 14.
[2] 63 & 64 Vict. c. 12, sec. 73.
[3] *Ibid.* secs. 75–6. See p. 73 above.

CHAPTER IX

New Zealand

The Colony of New Zealand. New Zealand, or the "Long White Cloud," as it is picturesquely called by the Maoris,[1] comprises the North, South and Stewart Islands, along with many adjacent islands some of which were only recently added to the colony. Thus the Kermadec Islands were annexed in 1887, and it was only in 1902 that the Cook and several other islands became part of New Zealand. The two principal islands are of course the North and South.

New Zealand has not joined the Commonwealth of Australia, and remains a separate self-governing colony. In one respect it differs from the Australian States. In Australia the aboriginal natives have nothing in the way of a settlement upon the soil and lead a purely savage life. They are a negligible factor in political life. But in New Zealand, chiefly in North Island, there still exists a comparatively large, though diminishing number of intelligent Maoris who have become civilized and must be reckoned with in constitutional government.

The Constitution of New Zealand. The constitutional form of government in New Zealand really began with *provincial* government. The New Zealand Constitution Act of 1852[2] created six Provinces, namely, Auckland, New

[1] Ao-Tea-Roa is the Maori word. See *The Long White Cloud*, by the Hon. W. P. Reeves, p. 1.

[2] 15 & 16 Vict. c. 72. See secs. 2, 3.

Plymouth,[1] Wellington, Nelson, Canterbury and Otago, each of which was to be governed by an elected Superintendent and an elected Provincial Council. The number of Provinces was subsequently increased to nine. Hawk's Bay was created out of Wellington, and Marlborough out of Nelson. As the Province of Canterbury was developed, a new Province, called Westland, was detached from it. The provincial franchise was based on a property qualification,[2] and the Provincial Councils had a restricted legislative power. They could not legislate on *inter-provincial* matters, *e.g.* customs, posts, etc., nor on marriage, Crown lands, and many other topics.[3] The assent of the Governor of New Zealand was made necessary to all provincial legislation.[4] The Act further provided for the establishment of a General Assembly, a singularly appropriate name for the parliament of a colony which is inhabited by so many Scottish people accustomed to a presbyterian form of church government. The General Assembly was to consist of a Governor, a Legislative Council whose members were to be nominated for life by the Governor, and an elected House of Representatives.[5] It had full powers of legislation for the "peace, order and good government of New Zealand," always provided that its laws were not repugnant to the Laws of England, *i.e.* to imperial *statutes* extending to New Zealand.[6]

Strangely enough the provincial system was started prior to the establishment of the General Assembly. Before the end of 1854 "the new provincial organization was in full work, and had already tasted the sweets of power. Why it was allowed to precede the General Assembly it is difficult to say; certainly the arrangement produced difficulties."[7] Owing to the bad means of communication between the different Provinces, which had been established as settlements

[1] In 1859 New Plymouth changed its name to Taranaki.
[2] 15 & 16 Vict. c. 72, sec. 7.
[3] *Ibid.* sec. 19.
[4] *Ibid.* secs. 27–31.
[5] *Ibid.* secs. 32–3, 40–1.
[6] *Ibid.* sec. 53.
[7] Jenks, *History of the Australasian Colonies*, p. 202.

in different parts at different times, New Zealand had really grown up as a combination of different colonies, almost completely separated from each other politically and socially. There was thus a strong *local* feeling in the different Provinces, when the General Assembly was established. Strife arose between the Provinces and the Central Government chiefly over taxation and the appropriation of revenue. But as better facilities of communication grew up, and local government became more subdivided, the Provincial Councils fell gradually into disrepute. Eventually by an Act in 1876[1] the General Assembly abolished the provincial system and established in its stead local boards, called County Councils. This latter term had been first applied to Westland, and this is "perhaps the earliest instance of the use in modern politics of the now familiar term 'county council.'"[2] The land belonging to the Provincial Councils was transferred to the Government of New Zealand. Local government is now minutely subdivided into hundreds of small local bodies.

The General Assembly. The Constitution Act of 1852 forms the basis of the constitutional structure of New Zealand. But it has been amended by several imperial Acts,[3] not to mention local ones. The General Assembly consists, as we have seen, of the Governor, a nominated Legislative Council, and an elected House of Representatives. Laws passed by it are expressed to be made "by the General Assembly of New Zealand in Parliament assembled."

The Legislative Council. The members of the Legislative Council are nominated by the Governor, acting on the advice of his Ministry. A New Zealand Act of 1891 reduced their term of office from life to seven years. But they may be reappointed. No limit is fixed to the number of members, except that it must not fall below ten.[4]

[1] 39 Vict. No. 21.
[2] Jenks, *History of the Australasian Colonies*, p. 203.
[3] 20 & 21 Vict. c. 53; 25 & 26 Vict. c. 48; 31 & 32 Vict. c. 57.
[4] 15 & 16 Vict. c. 72, sec. 33.

At present there are forty-five members (including two Maoris), who are each paid £200 a year.

Members of the Legislative Council must be of full age and British subjects by birth or naturalization. There is no property qualification.[1] A member may resign his seat by a written notice addressed to the Governor, and vacates his seat by becoming (1) absent for two consecutive sessions without permission, or (2) an alien, or (3) bankrupt or insolvent, or (4) attainted of treason or convicted of felony or any infamous crime.[2] The Governor appoints the Speaker of the Legislative Council.[3]

The House of Representatives. The number of members of the House of Representatives (other than Maori members) is seventy-six.[4] The number of Maori members is four. The only qualification for membership, in addition to being a British subject by birth or naturalization and of full age, is that of being an elector or qualified to become one. Members may resign their seats by written notice sent to the Speaker of the House of Representatives. They vacate their seats on much the same grounds as members of the Lower House in the States of the Australian Commonwealth, the disqualifying period of absence being one session.[5] But members, on accepting Cabinet Office, do not require re-election. The House of Representatives chooses its own Speaker from amongst its members, who are each paid a salary of £300 a year. The duration of the House of Representatives is three years, unless sooner dissolved by the Governor.

The Electoral Law. The members of the House of Representatives are elected by the people. Every man or woman,[6] of full age and a British subject, is entitled to a vote, provided that he or she have resided one year in New

[1] 15 & 16 Vict. c. 72, sec. 33.
[2] *Ibid.* sec. 36. [3] *Ibid.* sec. 38.
[4] New Zealand Representation Act, No. 44 of 1900.
[5] See 15 & 16 Vict. c. 72, sec. 50, and p. 85 above.
[6] New Zealand Electoral Act, 1893.

Zealand and three months in an electoral district. Property qualifications were entirely abolished by the New Zealand Electoral Act Amendment Act of 1896. So there is no plural voting, and the system of "one man one vote" prevails. The voting is by ballot. Each of the four Maori members is elected by adult Maoris of either sex, who are resident in the electoral district which returns him. There are four such districts. The Maori members are said to be active in the House.

Three peculiarities in the New Zealand electoral law call for notice. The first is that every voter who fails to record his vote has his name removed from the electoral roll after the election.[1] The second is that in the case of certain persons, such as seamen or shearers, who may be from home at election time, voting by letter is allowed. It is also allowed to women. The third is that the demarcation of electoral districts is left to two Boards or Standing Commissions, one for the North, and one for the South Island. They *redistribute* seats, each within its own Island, after every census. The Representation Act[2] created six new seats, and provided that the two Standing Commissions were to meet together once, under the Act, to decide how many of these six seats were to go to each Island, and were then to resume their separate duties. The rules which the Standing Commissions follow in redistributing seats are laid down in New Zealand Acts of 1887 and 1889. The principle is that proportionately more representation is given to the population outside towns containing more than 2,000 inhabitants than to the population in such towns. Each of the two Islands is divided into districts of approximately equal population, each returning one member. A few towns return three members.

Legislative powers of the General Assembly. Section 53 of the New Zealand Constitution Act of 1852[3]

[1] New Zealand Electoral Act, 1893, sec. 125.
[2] No. 44 of 1900. [3] 15 & 16 Vict. c. 72.

empowers the General Assembly to make laws for "the peace, order and good government of New Zealand." But any Bill making alterations affecting the election of members of the House of Representatives, or the qualifications of electors and members must be (1) reserved for the royal assent, and (2) laid for thirty days before the British Parliament prior to such assent being given.[1] It is further provided that duties are not to be levied inconsistent with treaties concluded by the Crown with any foreign power.[2]

By a subsequent Act[3] the General Assembly acquired wider powers of constitutional change. But section 2 of that Act makes certain provisions unalterable, in addition to the provisions above mentioned with respect to the levying of duties and the reservations of certain Bills. These are the following:—

(*a*) The General Assembly must consist of a Governor, a Legislative Council and a House of Representatives.[4]

(*b*) There must always be a Speaker of the House of Representatives elected by themselves.[5]

(*c*) The form of the oath of allegiance prescribed by the Constitution Act of 1852 cannot be varied.[6]

(*d*) The Governor must first recommend Bills, appropriating to the public service the public revenue, to the House of Representatives.[7]

Powers of either House. The only rule with regard to money Bills is that last mentioned. They must be recommended to the House of Representatives by the Governor. They therefore originate in that House. But the power of rejection by the Legislative Council is clearly implied by the provision that it is only the *whole* Assembly that can legislate. According to constitutional practice the Legislative Council cannot amend such Bills.

There have been frequent collisions between the Chambers.

1 15 & 16 Vict. c. 72, sec. 68.
2 *Ibid.* sec. 61. See, however, p. 89 above.
3 20 & 21 Vict. c. 53. 4 15 & 16 Vict. c. 12, sec. 32.
5 *Ibid.* sec. 47. 6 *Ibia.* sec. 46. 7 *Ibid.* sec. 45.

Prior to 1891 the nominees to the Legislative Council held their seats for life, and nothing conduces more to conservatism than increasing age. Even after 1891, when the tenure was reduced to seven years, the Liberals, who were in a large majority in the House of Representatives and throughout New Zealand, had only two or three supporters in the Legislative Council. Important liberal measures were thus defeated. So the Cabinet asked the Governor to nominate twelve more persons to the Legislative Council. The Governor refused to act on the advice of his Ministry, but ultimately the matter was referred to the Colonial Office and decided in favour of the Liberal Cabinet.[1] Since then the Legislative Council seems to have fallen into line with the House of Representatives; for the most radical measures have been passed, such as the Old Age Pensions Act of 1898 (made permanent in 1900), the Industrial Conciliation and Arbitration Act of 1900, etc.

The Executive and Cabinet Government. In the New Zealand Constitution Act of 1852[2] no reference is made directly or indirectly to the system of responsible government. The Executive Council is not even mentioned, and the Governor's Commission at that time implied a *permanent* Executive. Consequently soon after the General Assembly met for the first time, the question of Cabinet Government was raised. The existing Executive Councillors stuck to their posts, and there was an *impasse*. The offices of the Home Government were called in. But it intimated that no legislation was necessary except for providing pensions to the Executive Officers of the old system. The Cabinet system of Government in New Zealand therefore rests *entirely* upon custom, not on *law*, just as it does in the United Kingdom.

The executive power is now vested in a Governor and

[1] Parliamentary Papers (Appointment to Upper Chamber in New Zealand), House of Commons, No. 198 of 1893–4.

[2] 15 & 16 Vict. c. 72.

an Executive Council[1] whose members are composed of the Ministry for the time being. Two peculiarities of the Cabinet system of government in New Zealand deserve notice. Most of the members of the Cabinet are chiefs of more than one Department of State, and there is no Minister who does not hold office. Secondly, there have been but few changes of Government. A Government always lasts for the period of three years at least. The Liberals have had a long spell of office. But there is one decided drawback in the election system. All the elections take place in one day,[2] so that a leading and able statesman may be out of the House of Assembly for years, if he lose his seat.

The Governor. Very little need be said about the legal and constitutional powers of the Governor.[3] He assents to legislation in the Crown's name, but must reserve certain Bills.[4] He summons and prorogues the General Assembly. But he cannot dissolve the Legislative Council, and the General Assembly must meet once at least every year. He has the usual powers of pardon, and recommends money votes to the House of Representatives.

Departments of State. The leading Departments of State in New Zealand are the following :—

The Department of the Colonial Secretary.
The Department of the Treasury.
The Department of Justice.
The Post and Telegraph Department.
The Trade and Customs Department.
The Department of Industries and Commerce.
The Department of Labour.
The Department of Agriculture.
The Department of Mines.
The Railway Department.
The Public Works Department.

[1] Letters Patent to the Governor of New Zealand, February 22, 1879.

[2] This is also the case in South Australia.

[3] See pp. 55–7 above.

[4] See p. 96 above.

The Crown Lands and Survey Department.
The Department of Defence.
The Education Department.
The Marine Department.

In New Zealand the State undertakes more functions than probably anywhere else in the British possessions. It is the largest landowner in New Zealand. Instead of selling Crown lands out and out, it usually lets them for a long lease, and has thus the biggest rent roll. It can repurchase private lands even against the owner's wish, but with compensation. The State is the largest employer of labour. It owns the railways, or most of them. The postal, telegraphic and telephone system is in its possession. It conducts most of the life assurance business. In 1895 the Bank of New Zealand was practically placed under State control. The State undertakes numerous public works. It also undertakes education, which is compulsory, secular and free.[1] Under an Act of 1894 a Government Advances to Settlers' Office was established to enable settlers to obtain advances at a reasonable rate of interest. That Act was amended to extend its advantages to town properties. Most of the legal conveyancing work is done by the Government under the Land Transfer Act. There exists also a Public Trust Office which administers the estates of people dying intestate, and also those of people who have appointed the Public Trustee their executor. The Public Trust Office Consolidation Act of 1894 enlarged the functions of the Trustee. The Public Trustee can now act as agent or attorney. The State guarantees the safe keeping of all funds placed under the Public Trustee's control. The Department of Labour includes amongst its duties that of acting as a servants' registry office. It also assists the unemployed to find employment. Lastly, the Old Age Pensions Act of 1898 (made perpetual in 1900) provides for an old age pension out of the Consolidated Fund of the State to all

[1] New Zealand Education Act of 1877.

New Zealanders over sixty-five years of age, who have resided for not less than twenty-five years in the colony, are of good character,[1] and do not possess property worth £270 or more, or enjoy an income of £50 a year.[2] It does not apply to Chinamen or other Asiatics, whether naturalized or not.[3] The pension is £18 a year, payable monthly. But for each £1 of income above £34, and for each £15 of property above £50, £1 is deducted from the pension. New Zealand thus forms an interesting illustration of socialistic tendency, from which valuable lessons in the future may be drawn.

The Judicature. The Supreme Court of New Zealand consists of a Chief Justice and five puisne Judges. One of the judges is assigned to Auckland, two to Wellington, Nelson and Marlborough, one to Canterbury and Westland; and the fifth to Otago. The Supreme Court sits as a Court of Appeal twice a year at Wellington. Its original jurisdiction in serious criminal offences and important civil cases is exercised by the Judges in the different Provinces to which they are assigned. There are also District Courts, and Stipendiary Magistrates' Courts, with a more limited criminal and civil jurisdiction. Judges, called wardens, decide mining disputes. There are thirty-one Stipendiary Magistrates who sit daily in the principal towns throughout New Zealand. The Criminal Code Act of 1893 codified the New Zealand criminal law, and abolished penal servitude, substituting therefor imprisonment with hard labour.

The Judges of the Supreme Court are appointed by the Governor,[4] and may be removed by him, in the name and on behalf of the Crown, upon the address of both Houses of the General Assembly.[5] The Civil Courts of New Zealand have jurisdiction, under the Native Rights Act of 1865,[6] to

[1] Secs. 7, 8 of the Old Age Pensions Act of 1898.
[2] Old Age Pensions Amendment Act of 1900.
[3] Sec. 64 of the Act of 1898.
[4] Supreme Court Judges Act of 1858, sec. 2.
[5] *Ibid.* sec. 4. [6] 29 Vict., No. 11, secs. 3–5

ascertain as therein provided, native rights to, and interest in land according to the custom and usage of the Maoris, and they are bound, in any action in which such title is involved, to recognize the rightful possession and occupation of lands by the natives until lawfully extinguished, and to give effect to it.[1] The Maoris are very litigious, and will fight a case to the last, carrying it to the Judicial Committee of the Privy Council. In a recent appeal to that Court[2] a regrettable incident occurred. The Judges, in reversing the decision of the Supreme Court of New Zealand, made an apparently unwarrantable attack upon the Supreme Court, virtually accusing it of subserviency to the Executive Government. There was a special aggravation in this, inasmuch as the decision of the Privy Council seemed to have been based upon a superficial knowledge of the history and legislation of New Zealand. The Judges of the New Zealand Supreme Court made a strong protest, one of them saying: "If the Court had displayed subserviency or want of independence of the Executive, it would have been loudly condemned by a unanimous public opinion. No suggestion of the kind has ever been made here. It has been reserved for four strangers sitting 14,000 miles away to make it. . . . That Court,[3] by its imputations in the present case, by the ignorance it has shown in this and other cases of our history, of our legislation, and of our practice, and by its long-delayed judgments, has displayed every characteristic of an alien tribunal."

Government of the Cook and other Islands. We have seen that in 1902 the Cook and several other Islands were annexed to New Zealand. The Cook Islands are nine in number, and the others eight. These are now

[1] *Nireaha Tamaki* v. *Baker* (1901), A.C. 561.

[2] *Wallis* v. *Solicitor-General of New Zealand* (1903), A.C. 173.

[3] The Privy Council. The language used shows that there still exists in New Zealand a strong feeling against the Privy Council as a final Court of Appeal. *Cf.* the provision in the Commonwealth of Australia Act (p. 27 above).

governed under the provisions of the Cook and other Islands Government Act of 1901.

Federal Council. There is an elected Federal Council for all the islands, which is chiefly composed of the Arikis, or the Kings and Queens. It has power to make Federal Ordinances for all the islands. But each island has a Council of its own, which makes ordinances for the government of the inhabitants within its jurisdiction. But both Federal and Local Ordinances must be transmitted by the Resident Commissioner to the Governor of New Zealand for his approval.[1] The Governor of New Zealand may also direct that any law in force in New Zealand, other than laws relating to the sale of alcoholic liquors, shall be extended to the Islands.[2]

The Judicature. The High Court at Rarotonga has jurisdiction throughout all the islands. But in the Cook Islands there is the Arikis' Court,[3] composed of native judges, from which an appeal lies to the High Court. The Arikis' Court deals with minor offences. But the High Court alone can deal with grave crimes, *e.g.* murder, manslaughter. It also exercises exclusive jurisdiction in all civil cases in which foreign residents are accused, and in all civil cases between foreign residents, or between Maoris and foreign residents.

Military and Naval Defence. The New Zealand Defence Act of 1886[4] constituted a militia of all male inhabitants between the ages of seventeen and fifty-five; but certain exemptions were made. As a matter of fact the militia is recruited by voluntary enlistment. A volunteer force also exists. The chief parts of the colony have been lately placed in a state of strong defence with submarine mines and guns of the latest type. Part of the militia consists of submarine miners, and torpedo boats are attached to this corps.

[1] The Cook and other Islands Government Act of 1901, sec. 8.

[2] *Ibid.* sec. 3.

[3] At Aitutaki, one of the Cook Islands, there is a European magistrate.

[4] No. 17 of that year.

The naval defence really rests on the Australian Imperial Squadron, towards whose upkeep New Zealand contributes an annual sum.[1] The Minister of Defence is of course responsible to the General Assembly for the adequate defences of the colony.

This concludes our examination of the Australasian group of self-governing colonies, and we turn now to the Canadian or North American group.

[1] See p. 77 above.

CHAPTER X

The Dominion of Canada

The Canadian Provinces. The Dominion of Canada is at present composed of seven Provinces, namely, Ontario, Quebec, Nova Scotia, New Brunswick, Manitoba, British Columbia, and Prince Edward Island. In addition to these seven Provinces, it includes the District of Keewatin and a large extent of territory known as the North-Western Territory. When the Dominion was constituted in 1867, by the British North America Act [1] of that year, it consisted only of four Provinces which had agreed to unite—Ontario and Quebec (previously called Upper and Lower Canada respectively), Nova Scotia, and New Brunswick. The Act gave power to the Queen in Council to admit Newfoundland, Prince Edward Island, British Columbia, Rupert's Land, and the North-Western Territory into the Union, should these colonies be agreeable.[2] In 1871, British Columbia was admitted into the Dominion, being followed in 1873 by Prince Edward Island. The North-Western Territory and Rupert's Land had been in 1870 ceded to the Dominion by an order of the Queen in Council dated June 24 of that year. Out of the North-Western Territory and Rupert's Land was formed the Province of Manitoba. This was done by an Act of the Canadian Parliament passed in 1870.[3] In 1876, the District of Keewatin was also formed out of the

[1] 30 & 31 Vict. c. 3.
[2] *Ibid.* sec. 146.
[3] 33 Vict. c. 3.

North-Western Territory, the remaining part being still known as such. Newfoundland never joined the Dominion.

The Constitution of the Dominion. The Charter of the Dominion of Canada is the British North America Act, 1867. That Act has been further supplemented by the British North America Act of 1871,[1] the Parliament of Canada Act of 1875,[2] and the British North America Act of 1886.[3] The first-named Act lays down the fundamental constitution of the Dominion of Canada and its relation to the Provinces and Territories of which it is composed.

The Parliament. The legislative power is vested in the Crown, the Governor-General, and the Parliament of Canada.[4] The Parliament is composed of two chambers, the Senate and the House of Commons. Canada is the only British possession in which the lower house of parliament is known as the House of Commons. The Parliament must meet once at least every year.[5]

The Senate. The Senate is composed of members nominated by the Governor-General for life.[6] They must be selected from residents in the different Provinces and Territories in certain proportions which have now been adjusted in this way. Ontario and Quebec are each represented by twenty-four senators, Nova Scotia and New Brunswick each by ten, British Columbia and Manitoba each by three, Prince Edward Island by four, and the North-Western Territory by two.[7] The Crown may, on the recommendation of the Governor-General, direct that three or six qualified members (as the case may be) be added to the Senate. These latter are to represent equally the three divisions into which the British North America Act of 1867 divided

[1] 34 & 35 Vict. c. 28. [2] 38 & 39 Vict. c. 38.
[3] 49 & 50 Vict. c. 38.
[4] 30 & 31 Vict. c. 3, secs. 17, 55, 57.
[5] *Ibid.* sec. 20. [6] *Ibid.* secs. 24, 29.
[7] *Ibid.* secs. 22, 147; Order in Council of May 16, 1871; 34 & 35 Vict. c. 28, and the Canadian Act, 33 Vict. c. 3, sec. 3; 49 & 50 Vict. c. 35; the Canadian Act, 50 & 51 Vict. c. 3.

Canada, namely, Ontario, Quebec, and the Maritime Provinces.[1] A senator must be thirty years of age and a natural born or naturalized British subject. He must be possessed of real and personal property of 4,000 dollars over and above his debts and liabilities. Of this property a certain minimum amount must be freehold land. He must be resident in the Province for which he is appointed. But in the case of Quebec he need not be a resident, if his freehold property is situated there.[2] The Speaker of the Senate is appointed by the Governor-General, and fifteen senators, including the Speaker, are necessary to form a quorum.[3] The Speaker has a vote, and, if the voting is equal, the decision is deemed to be in the negative.[4] A senator ceases to hold his seat in any of the following cases:—(1) if he fails to attend for two consecutive sessions of the Parliament; (2) if he becomes a subject of a foreign power; (3) if he becomes bankrupt or insolvent; (4) if he is attainted of treason or convicted of felony or of any infamous crime; (5) if he ceases to possess the necessary qualification of property or residence. But he is not deemed to have lost the necessary qualification of residence, if he is required to reside at the Seat of Government through holding an office under it.[5] A senator may resign by writing to that effect to the Governor-General.[6]

The House of Commons. The members of the House of Commons are elected by the people possessing the necessary qualifications for voting. Sections 51 and 52 of the British North America Act, 1867, provide the basis on which the number of members allotted to the Provinces and Territories is to be regulated. Quebec is always to be represented by sixty-five members, and the other Provinces and Territories are to have a proportional number according to their population at each decennial census. As constituted prior to the recent election in November (1904), the number

[1] 30 & 31 Vict. c. 3, sec. 26.
[2] *Ibid.* sec. 23.
[3] *Ibid.* secs. 34, 35.
[4] *Ibid.* sec. 36.
[5] *Ibid.* sec. 31.
[6] *Ibid.* sec. 30.

of members was two hundred and thirteen, distributed in the following manner :—

Quebec	65
Ontario	92
Nova Scotia	20
New Brunswick	14
Manitoba	7
British Columbia	6
Prince Edward Island	5
The North-Western Territory	4
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The Provinces and the North-Western Territory are divided into electoral districts, and the general rule is that each district returns one member. A Redistribution Bill was, however, brought into the Dominion Parliament on March 31, 1903, and was passed on October 21 of the same year. It provides that in future Ontario shall have eighty-six members, Quebec eighty-five, Nova Scotia eighteen, New Brunswick thirteen, Manitoba ten, British Columbia seven, North-Western Territory ten, and Yukon one. Yukon is now one of the organized districts of the North-West Territory and returns two members to the Legislative Assembly of that Territory. It will in future also return a member to the House of Commons. The total membership will thus be increased to two hundred and fourteen.[1] Some doubt arose as to whether the measure was *constitutional* or not. But the Supreme Court of Canada, when consulted, expressed the opinion that it was within the powers of the Dominion Parliament.

The House of Commons elects its own Speaker from among its members, and twenty members are necessary to form a quorum.[2] In the case of voting being equal, the

[1] A general election having lately taken place, this is *now* the number of members.

[2] 30 & 31 Vict. c. 3, secs. 44, 48.

Speaker has a vote.[1] The duration of the House of Commons is for five years, unless sooner dissolved by the Governor-General.[2] A member requires no property qualification, but must be a natural born or naturalized British subject.[3] Some persons are disqualified by law from being members of the House of Commons, namely, (1) senators,[4] (2) members of any provincial legislative assembly or council,[5] (3) persons holding offices of emolument under the Crown,[6] except (*a*) Ministers of the Crown, (*b*) officers of militia, or militia men,[7] (4) contractors with the Government,[8] (5) persons guilty of corrupt practices at elections,[9] (6) revising officers for their districts,[10] (7) Sheriffs, Registrars of Deeds, Clerks of the Peace, and County Crown Attornies.[11] A member can resign either by giving notice of resignation in the House itself or by giving written notice, duly sealed and witnessed by two witnesses, to the Speaker, or if there is no Speaker or if the member himself is the Speaker, to two members.[12] Both members of the Senate and members of the House of Commons are paid. A senator receives 1,500 dollars a year, and a member of the House of Commons 10 dollars a day during the session, the maximum being 1,500 dollars a session.

The Dominion Franchise. In 1885 the Dominion Parliament made a uniform franchise—the franchise hitherto having been that required in each Province for the election of members of the Provincial Assembly.[13] The Act was amended in 1886.[14] But it was repealed by the Canadian Liberal Government, which came into office in 1897, and

[1] 30 & 31 Vict. c. 3, sec. 49. [2] *Ibid.* sec. 50.
[3] Revised Statutes of Canada (1886), c. 8, sec. 20.
[4] 30 & 31 Vict. c. 3, sec. 31.
[5] Revised Statutes of Canada (1886), c. 13, sec. 1.
[6] *Ibid.* c. 11, sec. 9. [7] *Ibid.* sec. 17.
[8] *Ibid.* secs. 10, 15. See also sec. 17.
[9] *Ibid.* c. 8, sec. 96. If the guilty person is a candidate, he is disqualified for seven years; if not, for eight years. See sec. 98.
[10] *Ibid.* sec. 20. [11] *Ibid.* c. 11, sec. 9.
[12] *Ibia.* c. 14, sec. 12. [13] 30 & 31 Vict. c. 3, sec. 41.
[14] See Revised Statutes of Canada (1886), c. 5.

a return was made to the electoral laws of the Provinces.[1] As we shall see, these give a liberal franchise, including a special one for Indians.

Privileges of Parliament. Section 1 of the Parliament of Canada Act, 1875,[2] empowered the Parliament of Canada to define the privileges, immunities and powers to be enjoyed by the Senate and the House of Commons, with the proviso that the privileges to be enjoyed should not exceed those of the British House of Commons at the time of the passing of the Dominion Act, namely, 1867. A Canadian Act[3] was passed declaring the privileges of the Dominion Parliament to be the same as those enjoyed by the Imperial House of Commons in 1867, but not enumerating them.[4] It, however, provided for a stay of all civil and criminal proceedings for publishing any report or proceeding by the authority of the Senate or House of Commons, on production of a certificate of the Speaker or Clerk of the Senate or House of Commons stating that such report or proceeding was published by authority.[5]

Legislative Powers of the Dominion Parliament. Provision was made in the British North America Act, 1867, for the distribution of legislative powers between the Dominion Parliament and Provincial Legislatures. The Dominion Parliament has power to legislate on all matters not exclusively assigned to the Provincial Legislatures, and particularly and exclusively on the following twenty-nine topics:—The public debt and property, trade and commerce, taxation, the borrowing of money on public credit, the postal service, the census and statistics, naval and military service and defence, salaries and allowances of officers of the Government of Canada, beacons, buoys, lighthouses and Sable Island, navigation and shipping, quarantine and marine hospitals, sea coast and inland

[1] See Bourinot's *Canada under British Rule*, p. 268.
[2] 38 & 39 Vict. c. 38.
[3] Revised Statutes of Canada (1886), c. 11.
[4] See p. 67 above.
[5] Revised Statutes of Canada (1886), c. 11, sec. 6.

fisheries, ferries between two Provinces or between a Province and any British or foreign country, currency and coinage, banking, incorporation of banks and the issue of paper money, savings banks, weights and measures, bills of exchange and promissory notes, interest, legal tender, bankruptcy and insolvency, patents, copyrights, Indians and land reserved for them, naturalization and aliens, marriage and divorce, criminal law and procedure (except the constitution of criminal courts), penitentiaries, and such classes of subjects as are expressly excepted in the enumeration of the classes of subjects by the Act assigned exclusively to Provincial Legislatures.[1]

The interpretation of this section of the British North America Act of 1867 has given rise to much litigation, and is too difficult to discuss here.[2] But we may note that while in Canada it is the Provincial Legislatures which are limited to the exercise of power specifically given to them, the Dominion Parliament having all the rest, in Australia the Commonwealth Parliament has only those legislative powers expressly delegated to it, the Parliaments of the States having all the rest.

Powers of each House of Parliament. Public bills may originate in either the Senate or the House of Commons. But bills for appropriating any part of the public revenue, or for imposing any tax or impost must originate in the House of Commons.[3] The House of Commons cannot adopt or pass any vote, resolution, address, or bill for the appropriation of any part of the public revenue, or of any tax or import, to any purpose that has not been first recommended to that House by message of the Governor-General in the session in which such vote, resolution, address, or bill is proposed.[4] The Senate may, by constitutional practice, reject, but cannot amend money bills.

No provision is made against a deadlock between the two

[1] 30 & 31 Vict. c. 3, sec. 91.
[2] See Munro, *Constitution of Canada*, chap. xix.
[3] 30 & 31 Vict. c. 3, sec. 53.
[4] *Ibid.* sec. 54.

Houses as is done in the constitution of the Australian Commonwealth,[1] except that the Crown may on the recommendation of the Governor-General direct that three or six members be added to the Senate.[2] It appears that this section was intended to provide a means of bringing the Senate into agreement with the House of Commons in the event of an actual collision of opinion between the two Houses.[3] This provision is very limited. But by the control which the House of Commons has over money bills, it could, by refusing to vote supplies, soon bring a recalcitrant Senate to its senses.

The Executive. The executive government of Canada resides in the Crown as represented by the Governor-General,[4] He has a Council to aid and advise him in the government of Canada, called the King's Privy Council for Canada. The members of the Privy Council are chosen and summoned by the Governor-General and sworn in as Privy Councillors. They may be removed by the Governor-General.[5] All powers which at the Union of the Provinces were vested in the Governors of the Provinces with the advice of the respective Executive Councils thereof are vested in the Governor-General and the Privy Council.[6]

Powers of the Governor-General. The powers of the Governor-General with respect to (1) assenting or refusing assent to bills, or reserving them for the Royal assent, (2) pardon, (3) summoning, proroguing and dissolving the House of Commons, (4) and recommending money votes, are similar to those of the Governor-General of the Australian Commonwealth.[7] But he cannot dissolve the Senate, though he has the power of nominating its members and of appointing and removing the Speaker. Unlike the Governor-General of the Australian Commonwealth, the Governor-General of Canada, acting with the Privy Council, appoints the

[1] See p. 66 above. [2] 30 & 31 Vict. c. 3, sec. 26.
[3] Munro, *Constitution of Canada*, p. 143.
[4] 30 & 31 Vict. c. 3, secs. 9, 10. [5] *Ibid.* sec. 11.
[6] *Ibia.* sec. 12. [7] See pp. 68–70 above.

Lieutenant-Governors of Provinces,[1] and hears any appeal from any Act or decision of any Provincial authority affecting any right or privilege of a minority, whether Protestant or Roman Catholic, of the King's subjects in relation to education.[2]

The Privy Council and the Cabinet. A distinction has grown up in Canada between Privy Councillors who are members of the Cabinet and Honorary Privy Councillors who are not in the Cabinet. "In accordance with the well-established principles of responsible government the members of the Council are selected from that party which enjoys the confidence of the majority of the members of the House of Commons, and the Prime Minister nominates his colleagues. The Governor-General is empowered to remove members of the Council, but in practice the Ministry resign when they lose the confidence of the Legislature. By command of the Queen members of the Privy Council after their retirement are permitted to retain the title of 'honourable' for life, and those who do not belong to the Cabinet for the time being may be regarded as 'honourable' members of the Privy Council."[3] In strict law such persons are *not* members of the Privy Council. They do not attend Cabinet meetings, nor does the Governor-General unless on very exceptional occasions.[4] As in England, the majority of the Cabinet have seats in the House of Commons, and the members are chiefs for the time being of the important Executive Departments.

Departments of State. The chief Departments of State are thirteen in number, viz.:—

The Department of Trade and Commerce.
The Department of the Secretary of State.
The Department of Militia and Defence.
The Department of the Post Office.

[1] 30 & 31 Vict. c. 3, sec. 58. [2] *Ibid.* sec. 93 (3).
[3] Munro, *Constitution of Canada*, pp. 168–9.
[4] Todd, *Parliamentary Government in the British Colonies* (2nd ed.), p. 37.

The Department of Agriculture and Statistics.
The Department of Public Works.
The Department of Finance.
The Department of Railways and Finance.
The Department of the Interior.
The Department of Customs.
The Department of Inland Revenue.
The Department of Marine and Fisheries.
The Department of Justice.

There is a Department of Public Printing and Stationery which is presided over by the Secretary of State or by such other member of the King's Privy Council for Canada as the Governor-General in Council may direct. There is a Department of Indian Affairs, but a Canadian Act[1] provided that the chief of that Department should be either the Minister of the Interior or the head of some other Department appointed for that purpose by order of the Privy Council for Canada. The President of the Privy Council, who is always the Prime Minister, now looks after it. The Prime Minister is also a member of the Treasury Board, formed of the Minister of Finance and five members of the Privy Council to act as a committee in all matters of finance referred to it by the Privy Council.

Each Department has a permanent staff, and appointments in it are usually made after an examination just as in our own Civil Service.[2] At the head of each Department is a Deputy Head, corresponding to our permanent Under-Secretaries of State. He is appointed by the Governor-General in Council, and holds office during pleasure. But if he is removed, the reason for his removal must be laid before Parliament within fifteen days of the next session.[3]

Differences between the Canadian and British Cabinet System. The Cabinet system in Canada differs in details from that in the United Kingdom. To a large

[1] 46 Vict. c. 6. [2] Revised Statutes of Canada (1886), c. 17.
[3] *Ibid.* sec. 11.

extent the differences are like those in Australia.[1] Thus the Cabinet usually includes one or more members "without a portfolio" *i.e.* holding no office. Again, the Attorney-General sits in the Cabinet as Minister of Justice. But there are some peculiarities in the Canadian practice. The Cabinet does not consist of all the Ministry as in Australia, the Solicitor-General not being in it. In this respect it is closer to the constitutional practice in the United Kingdom, where subordinate Ministers are not in the Cabinet. Again there are "honorary" members of the Privy Council who are not in the Cabinet for the time being; so that the Canadian Cabinet is, like the British, a committee of the Privy Council.[2] Lastly, the claims of the different Provinces to be represented in the Cabinet are occasionally recognized. This has been done to some extent in the Cabinet of the Australian Commonwealth.

The Judicature. The Dominion Parliament has power to provide for the constitution, maintenance, and organization of a General Court of Appeal for Canada, and for the establishment of any additional Courts for the better administration of the laws of Canada.[3] The Supreme Court of Canada, the Court of Exchequer, and a Maritime Court have been established.

The Supreme Court. The Supreme Court of Canada is composed of a Chief Justice and five puisne Judges. It has an appellate jurisdiction in civil and criminal cases throughout the Dominion of Canada. An appeal lies from all Supreme Provincial Courts to it, as well as from the Exchequer Court and Maritime Court. It also acts as a Court of Appeal in questions of controverted elections.[4] The Dominion Controverted Elections Act[5] conferred

[1] See p. 71 above.
[2] But see pp. 53–4 above.
[3] 30 & 31 Vict. c. 3, sec. 101.
[4] See the Canadian Act, 38 Vict. c. 11; Revised Statutes of Canada (1886), c. 135, secs. 23–31, 70; and the Canadian Act, 50 & 51 Vict. c. 16.
[5] Revised Statutes of Canada (1886), c. 9.

jurisdiction in such matters on the Supreme Court in each Province, but only one Judge sits. An appeal lies to the Supreme Court of which he is one of the Judges, and thence to the Supreme Court of Canada. The Supreme Court of Canada has occasionally matters referred to it by the Canadian Privy Council, and may also report on private bills, if desired by Parliament. Some of the Provinces, *e.g.* British Columbia, Nova Scotia, and Quebec, have also agreed that the Supreme Court is to determine controversies between the Dominion and them, or between themselves.[1]

The Exchequer Court. The Exchequer Court consists of one Judge. It exercises *exclusive* jurisdiction in cases of claims against the Crown. It has a *concurrent* jurisdiction with the Provincial courts in revenue cases, or patent and land cases raised by the Attorney, or cases against any Crown officer for acts or omissions in the performance of his duty, or cases in which the Crown is the plaintiff.

The Maritime Court. The Maritime Court was established in Ontario. It exercises jurisdiction in cases connected with shipping, navigation, trade and commerce on any river, lake, canal, or inland water of which the whole or part is in the Province of Ontario.

The Judges. The Judges of the Superior, District, and County Courts in each Province (except the Courts of Probate in Nova Scotia and New Brunswick), as well as of the three Courts above mentioned, are appointed by the Governor-General, and are paid by the Parliament of Canada. They all hold office on good behaviour, but may be removed by the Governor-General on address to him by the Senate and the House of Commons.[2] There is a wise provision, which might well be adopted elsewhere, that

[1] Revised Statutes of Canada (1886), c. 135, secs. 72–74; Act of British Columbia, 45 Vict. c. 2; Revised Statutes of Ontario (1887), c. 42; Revised Statutes of Nova Scotia (1884), c. 111.

[2] 30 & 31 Vict. c. 3, secs. 96–100, and Revised Statutes of Canada (1886), c. 138.

Judges may be removed by Order in Council for (1) inability or old age or ill health, or (2) incapacity or misbehaviour. But an inquiry must be held, and reasonable notice of it given to the Judge. A Commission is appointed for the inquiry, and it consists of Judges.[1]

Appeals to the Privy Council. Appeals from the Supreme Court of Canada go to the Privy Council. But in *Théberge* v. *Landry*[2] it was held that the Judicial Committee of the Privy Council could not review the judgment of a Supreme Court in Canada upon an election petition. This decision was explained in the subsequent case of *Cushing* v. *Dupuy*[3] as being distinctly and carefully rested on the peculiarity of the subject-matter, which concerned not merely ordinary civil rights, *but rights and privileges always regarded as pertaining to the Legislative Assembly in complete independence of the Crown, so far as they properly existed.*

Alteration of the Constitution. The Dominion Parliament has only very limited powers of altering the Constitution of the Dominion. It cannot abolish either the Senate or the House of Commons. It cannot even alter the constitution of the Senate. It may increase the number of members of the House of Commons, but only in accordance with certain principles laid down in the British North America Act, 1867.[4] It cannot alter the constitution of a new Province, when it has once granted it.[5] It cannot impose protective duties as between the provinces,[6] nor tax any lands or property belonging to Canada or any Province.[7] The Seat of Government can only be altered by the Crown.[8]

The Dominion Parliament may, however, vary the quorum of the Senate,[9] but not that of the House of Commons.[10] It can change the electoral districts and the

[1] See last reference in preceding note.
[2] L.R. 2 App. Cas. 102.
[3] L.R. 5 App. Cas. 409. See p. 419, and p. 27 above.
[4] 30 & 31 Vict. c. 3. See secs. 51–2.
[5] 34 & 35 Vict. c. 28, sec. 2.
[6] 30 & 31 Vict. c. 3, sec. 121.
[7] *Ibid.* sec. 125.
[8] *Ibid.* sec. 16.
[9] *Ibid.* sec. 35.
[10] *Ibid.* sec. 48.

franchise.[1] It may make other provisions than those laid down in the Act in case of the absence of the Speaker of the House of Commons.[2] It can fix the salaries of the Judges and the Governor-General.[3] In short, the changes it can make in the Constitution are of little importance.

Military and Naval Defence. Section 15 of the British North America Act of 1867 declares that the command of naval and military forces continues vested in the Crown. The Canadian Militia Act of 1886[4] vests the command in the Crown or the Governor-General as representing the Crown. The Minister of Militia and Defence is responsible to the Parliament for the administration of the Militia. It consists of all male inhabitants between the ages of eighteen and sixty, who are not exempted[5] or disqualified by law and who are natural born or naturalized British subjects. But power is given to the Crown to require the services of all male inhabitants of the Dominion capable of bearing arms in case of a *levée en masse*.[6] The Active Militia consists of a land and a marine force. The land force of the Active Militia is raised by voluntary enlistment or ballot. The marine force consists of seamen employed in navigating the waters of the Dominion.[7] There is a Reserve Militia composed of all the men not serving in the Active Militia. The Canadian Militia forms the defence of the Dominion, and is under the immediate command of a military officer sent out from England. But there is an imperial naval station at Halifax, strongly fortified. An Army Board has recently been established in Canada for the supervision of the military forces.

[1] 30 & 34 Vict. c. 3, secs. 40–1. [2] *Ibid.* sec. 47.
[3] *Ibid.* secs. 100, 105. [4] Revised Statutes of Canada, c. 41.
[5] For example, Judges, the clergy, etc. See *ibid.* sec. 11.
[6] *Ibid.* sec. 10. [7] *Ibid.* sec. 12.

CHAPTER XI

The Canadian Provinces and Newfoundland

The Dominion and the Provinces. Although exclusive powers of legislation on certain topics are assigned by the British North America Act of 1867 to the Provincial Legislatures, including the power of constitutional change, and although the system of responsible government prevails, the Provinces are not self-governing colonies.[1] They are in fact subordinate to the Dominion Government.

(1) The Lieutenant-Governor of each Province is appointed and dismissed by the Governor-General of Canada on the advice of his Cabinet. But he is not removable within five years of his appointment, except for cause assigned, which must be communicated to him in writing within one month after the order for his removal is made, and which must also be communicated to the Dominion Parliament.[2] Thus in 1878, M. Letellier, the Lieutenant-Governor of Quebec, was dismissed by the Governor-General of Canada[3] (on the advice of his Cabinet, he himself being against the dismissal), although a majority in the Quebec Legislature was in favour of his continuing in office.[4]

(2) Every Act of a Provincial Legislature must be sent to the Governor-General, and the Governor-General may, on the advice of his Cabinet and within one year, disallow

[1] See Schedule to 58 & 59 Vict. c. 34.
[2] 30 & 31 Vict. c. 3, secs. 58–9.
[3] At that time the Governor-General was the late Lord Dufferin.
[4] Munro, *Constitution of Canada*, pp. 173–4.

it.[1] Comparatively few Provincial Acts are disallowed. But any interference by the Crown with the veto of the Governor-General would be unconstitutional. Again, if a Lieutenant-Governor reserves a Provincial Bill, such reservation is made for the Governor-General's assent or refusal.[2] Further, the instructions which a Lieutenant-Governor receives come from the Governor-General.

(3) The Provincial Judges are appointed and removed by the Governor-General in Council. They are, as we have seen, also paid by the Dominion and not by the Provinces.[3]

(4) The legislative powers of the Provincial Legislatures are very much restricted, the residue remaining in the Dominion Parliament.

(5) The British North America Act of 1867 enacted that the following public works and property in each Province were to be the property of the Dominion Government:—

1. Canals, with lands and water-power connected therewith.
2. Public harbours.
3. Lighthouses and piers, and Sable Island.
4. Steamboats, dredges, and public vessels.
5. Rivers and lake improvements.
6. Railways and railway stocks, mortgages, and other debts due by railway companies.
7. Military roads.
8. Custom-houses, Post-offices, and all other public buildings, except such as the Canadian Government appropriated for the use of the Provincial Legislatures and Governments.
9. Property transferred by the British Government, and known as Ordnance Property.
10. Armouries, drill-sheds, military clothing and munitions of war, and lands set apart for general public purposes.[4]

[1] 30 & 31 Vict. c. 3, secs. 56, 90. [2] *Ibid.*
[3] See p. 126 above. [4] 30 & 31 Vict. c. 3, sec. 108.

The Dominion Government also took over the general public revenues and debts of the Provinces, as then existing at the Union, with the exception of certain portions.[1]

The Provincial Legislatures. In British Columbia, Manitoba,[2] New Brunswick,[3] Ontario,[4] Prince Edward Island,[5] and the North-Western Territory, the legislature consists of the Lieutenant-Governor and one Chamber, called a Legislative Assembly. In Nova Scotia and Quebec[6] it consists of the Lieutenant-Governor, a Legislative Council, and a Legislative Assembly. The Legislative Assembly is in all cases composed of elected members. The franchise is very democratic. In Ontario, Quebec, Manitoba, British Columbia, and the North-Western Territory, manhood suffrage is the rule, combined with residence varying from six months in British Columbia and one year in Manitoba to four years in Ontario and Quebec. There is no property or other financial qualification. Indians are excluded from the franchise in British Columbia,[7] and in Manitoba are also excluded if in receipt of an annuity or treaty money from the Crown.[8]

The numbers of the members of the Legislative Assemblies vary in the different Provinces. At present there are ninety-eight in Ontario, seventy-four in Quebec, thirty-eight in Nova Scotia and in British Columbia, forty-six in New Brunswick, forty in Manitoba, thirty in Prince Edward Island, and thirty-five in the North-Western Territory. The duration of the Legislative Assembly varies slightly. In Ontario and Quebec the Legislative Assembly sits for four years, unless sooner dissolved,[9] and this is the

1 30 & 31 Vict. c. 3, secs. 102, 110.
2 Act of Manitoba, 39 Vict. c. 28.
3 Act of New Brunswick, 54 Vict. c. 9.
4 30 & 31 Vict. c. 3, sec. 69.
5 Act of Prince Edward Island, 56 Vict.
6 30 & 31 Vict. c. 3, sec. 71.
7 British Columbia Provincial Elections Act, No. 22 of 1901.
8 Manitoba Elections Act, No. 11 of 1901.
9 30 & 31 Vict. c. 3, sec. 85.

general rule. But in the North-Western Territory the duration is two years. There is payment of members of the Legislative Assembly in each Province. Members are required to be British subjects by birth or naturalization, and of the age at least of twenty-one years. In Manitoba and British Columbia they must be voters in the Province. Persons disqualified from being members are, generally speaking, the same as those so disqualified from becoming members of the Canadian House of Commons.[1] But numerous additional officials are disqualified in each Province.

In Nova Scotia and Quebec[2] there is a Legislative Council in addition to a Legislative Assembly. In Nova Scotia it consists of twenty-one members nominated for life by the Lieutenant-Governor, and in Quebec of twenty-four members nominated for life by the Lieutenant-Governor in Council.[3] In Nova Scotia there is no statutory restriction on the choice of a member by the Lieutenant-General. In Quebec the qualifications of members of the Legislative Council are the same as those of the senators for Quebec,[4] and their places become vacant in the cases, *mutatis mutandis*, in which the place of senator becomes vacant.[5]

Legislative Powers of Provincial Legislatures. Section 92 of the British North America Act declares the following matters to be *exclusively* within the legislative powers of each Provincial Legislature, viz. :—

1. The amendment from time to time, notwithstanding anything in the Act, of the Constitution of the Province, except as regards the office of Lieutenant-Governor.
2. Direct taxation within the Province for raising a revenue for provincial purposes.

[1] See p. 119 above.
[2] 30 & 31 Vict. c. 3, sec. 71.
[3] *Ibid.* sec. 72.
[4] *Ibid.* sec. 73, and see p. 119 above.
[5] *Ibid.* sec. 74, and p. 119 above.

3. The borrowing of money on the sole credit of the Province.
4. The establishment and tenure of Provincial officers, and their appointment and payment.
5. The management and sale of the public lands belonging to the Province, and of the timber and wood thereon.
6. The establishment, maintenance, and management of public and reformatory prisons in and for the Province.
7. The establishment, maintenance and management of hospitals, asylums, charities, and eleemosynary institutions in and for the Province, other than marine hospitals.
8. Municipal institutions in the Province.
9. Shop, saloon, tavern, auctioneer, and other licences, in order to raise a revenue for provincial, local, or municipal purposes.
10. Local works and undertakings *other than such as are of the following classes:—*

    (*a*) Lines of steam or other ships, railways, canals, telegraphs and other works and undertakings connecting the Province with any other or others of the Provinces, or extending beyond the limits of the Province;

    (*b*) Lines of steamships between the Province and any British or foreign country;

    (*c*) Such works as, although wholly situate within the Province, are before or after their execution declared by the Dominion Parliament to be for the general advantage of Canada or for the advantage of two or more Provinces.

11. The incorporation of companies with provincial objects.
12. The solemnization of marriage in the Province.
13. Property and civil rights in the Province.

14. The administration of justice in the Province, including the constitution, maintenance and organization of provincial courts, both of civil and criminal jurisdiction, including procedure in civil matters in those courts.
15. The imposition of punishment by fine, penalty, or imprisonment for enforcing any law of the Province in relation to any matter coming within any of the classes of subjects enumerated in this Section.
16. Generally all matters of a merely local or private nature in the Province.

In each Province the Legislature may also exclusively make laws for education, subject to provisions protecting denominational schools, the dissentient schools of Roman Catholics and Protestants in Quebec, and the rights or privileges of Roman Catholic or Protestant minorities in relation to education. The Dominion Parliament may make remedial laws for the due execution of such provisions, so far as the circumstances of each case require.[1] The North-Western Territory is not a Province, and its Legislative Assembly has only such powers as the Dominion Parliament confers upon it.[2]

Powers of constitutional change. It will have been noticed that a Provincial Legislature has greater power of changing the Constitution of the Province than the Dominion Parliament has of changing the Constitution of Canada. The only thing it cannot change is the office of Lieutenant-Governor.[3] Such powers have been exercised. Within the last eighteen years New Brunswick, Manitoba, and Prince Edward Island abolished their Legislative Councils, and many changes have also been made by the different Provinces as regards the franchise and electoral machinery. Where the Provincial Legislature is composed of only one Chamber, it cannot be

[1] 30 & 31 Vict. c. 3, sec. 93, and see p. 123 above.
[2] Imperial Order in Council, dated June 24, 1870
[3] See p. 132 above.

abolished, though it can be amended. The power given by the British North America Act of 1867 is a power to *amend*, not to *abolish*. "The Act implies a Legislature of some kind in each Province." [1] It also makes a provision in respect of the Constitutions of the Legislative Assembly of Quebec. No change is to be made in the limits of the electoral divisions or districts mentioned in the Schedule to the Act, unless the second and third readings of any Bill proposing such change have been passed in the Legislative Assembly with the concurrence of the majority of the members representing all those electoral divisions or districts, and the Lieutenant-Governor cannot give his assent to such Bill unless an address has been presented to him by the Legislative Assembly stating that it has been so passed.[2]

Provincial administration. The executive power in each Province is vested in the Lieutenant-Governor (who is paid by the Dominion Government) and an Executive Council appointed by him. As the system of responsible government exists in the Provinces, the members of the Executive Council must in fact possess the confidence of the Legislative Assembly, and are in reality appointed and dismissed by it. The Executive Council is thus the Cabinet. Its numbers vary in the different Provinces, and it often includes members "without a portfolio," having charge of no Department of State. In the seven Provinces there are usually the following Departments of State :—

The Attorney-General's Department.
The Department of Public Works.
The Department of Crown Lands.
The Department of the Secretary of State.
The Department of the Treasury.

In some Provinces there are other additional Departments of State. Thus Ontario has a Department of Education, one of Agriculture, and one of Fisheries. Quebec has the same,

[1] Munro, *Constitution of Canada*, p. 231.
[2] 30 & 31 Vict. c. 3, sec. 80.

Fisheries, however, being included in the Department of Lands, Mines and Fisheries. The members of the Cabinet in each Province preside over one or more of these Departments, unless they are members "without portfolio." Thus the Quebec Organization of Departments Act empowers the Lieutenant-Governor to appoint from among the members of the Executive Council, a Minister of Justice (under the name of Attorney-General), a Provincial Secretary, a Minister of Colonization and Public Works, and a Minister of Lands, Mines and Fisheries.[1]

In the North-Western Territory the Executive Council consists only of three members. They are members of the Legislative Assembly, and the President of the Council is the Premier. Since 1897 this Council has had power to advise the Lieutenant-Governor on all matters of local administration.

The peculiarities in the position of the Lieutenant-Governor have already been mentioned.[2] His functions and powers otherwise are, *mutatis mutandis*, similar to those of the Governor-General.

The Provincial Judicature. In each Province Magistrates and Justices of the Peace are appointed by the Lieutenant-Governor, although the Governor-General may also appoint Justices. The Judges of the Courts of Probate in Nova Scotia and New Brunswick are also appointed by the Lieutenant-Governors of these Provinces. All other Provincial Judges are, as already noticed, appointed by the Dominion Government. The Provincial Courts are too numerous to mention in detail. But there usually exist three (and in several Provinces more) classes of civil courts, namely, the Small Debts Court or that of Justices of the Peace, County Courts or Circuit Courts, and a Supreme Court. There are six classes of criminal courts. Justices of the Peace try small offences. General or Quarter Sessions or the Recorder's Courts sit at least four times a year to try the more serious cases, except offences punishable

[1] Quebec Act, No. 8 of 1901. [2] See p. 129 above.

with death, libel, and certain cases of fraudulent crimes. In certain Provinces County Courts act as Courts of Appeal from decisions of Justices of the Peace in criminal cases. Circuit Courts are held periodically to try all offences. The Supreme Court of each Province has jurisdiction in all indictable offences.[1] Lastly, the Court for consideration of Crown Cases reserved, usually the Supreme Court of the Province or a division of it, decides all questions of law reserved for its consideration by a Judge in a trial of any one convicted on indictment of any crime.[2]

Keewatin. In dealing with the Provinces notice was taken of the North-Western Territory, which is not a Province. Something must now be said about the District of Keewatin. Keewatin is not a Province. It is administered by the Lieutenant-Governor of Manitoba, assisted by a Council of not less than five nor more than ten members appointed by the Governor-General of Canada in Council. The Lieutenant-Governor and his Council exercise only such legislative powers as are conferred upon them by the Governor-General in Council, and the balance of legislative power remains in the latter. The Governor-General may also disallow any law passed by the Lieutenant-Governor and his Council within two years of its passing. By the Keewatin Act of 1886[3] the Lieutenant-Governor has power to arrange for the administration of justice by appointing Justices of the Peace or otherwise.

Newfoundland. Newfoundland never joined the Dominion, and so remains a self-governing colony. The Instrument of its Constitution is the Commission to the Governor of March 2, 1832, as amended by Letters Patent issued by the Crown on March 28, 1876.[4] Responsible government was introduced into Newfoundland in 1855.

[1] Indictable offences are those which are not punishable on summary conviction before Justices only.

[2] See Revised Statutes of Canada (1886), c. 174.

[3] *Ibid.* c. 53.

[4] Stat. R. and O. Rev., vol. iii., p. 571. See 5 & 6 Vict. c. 120, secs. 1–4. The rest of the Act is repealed.

Its Legislature. The legislative power resides in the Governor, a Legislative Council and a House of Assembly. The Legislative Council consists of not more than fifteen members nominated for life by the Governor. The House of Assembly consists at present of thirty-six members elected by the people. The voting is by ballot, and every man has a vote. There is, however, a property qualification for members of the House of Assembly. A member must have either a net annual income of £100, or possess property of a net value of £500. The members both of the Legislative Council and of the House of Assembly are paid a small salary, an Act providing for it being annually passed by the Legislature. The Legislature of Newfoundland has supreme power to legislate for the peace, order, and good government of the colony. It has also the power to change the Constitution by an ordinary act of legislation.

Newfoundland is an example of a self-governing colony, the Legislature of which has refused to pass a law necessary to give effect to a treaty entered into by the Crown with another foreign Power, namely, France. But when the British Parliament brought in a Bill in 1891 to enforce such treaty, the Newfoundland Legislature ultimately gave way and passed the necessary measure.[1]

Its Executive. Newfoundland is administered by a Governor and an Executive Council, the latter being composed of the members of the Cabinet for the time being. The Governor presides in it. At present there are no less than five members "without a portfolio." The Departments of State are similar to those in the Canadian Provinces, though there is no Department of Crown Lands. But there is one of Agriculture and Mines.

Its Judicature. The Supreme Court consists of the Chief Justice and two other Judges. The Chief Justice also acts as Judge of the Vice-Admiralty Court. There

[1] See p. 25 above. The Newfoundland Parliament is now considering measures to give effect to the recent Anglo-French agreement.

are two District Court Judges, and a large number of local magistrates. The Courts of Quarter Sessions were abolished in 1901, and their appellate jurisdiction was partly vested in the Supreme Court, and partly in the Stipendiary Magistrates with a right of appeal to the Supreme Court.[1]

Defence. There is a branch of the Royal Naval Reserve, towards the upkeep of which Newfoundland contributes £3,000 a year. It has also given a contribution for the maintenance of the training ship which is stationed off its shores.

[1] Newfoundland Act, No. 5 of 1901.

CHAPTER XII

Cape Colony and Natal

We turn now to the last group of self-governing colonies, the South African group. It consists of Cape Colony and Natal. But a few words must first be said about the High Commissioner for South Africa.

The High Commissioner for South Africa. The office of High Commissioner for South Africa was created by Letters Patent in 1878. But changes were made in his Commission in 1900. He is now no longer Governor of the Cape of Good Hope Colony; but he is Governor of Basutoland, and exercises supervision over the Bechuanaland Protectorate and the British South African Company in Southern Rhodesia. At present he is Governor both of the Transvaal and Orange River colonies, and is empowered to invite conferences of the representatives of the South African colonial governments to discuss affairs of general importance to them all. He represents in a way the unity of our South African possessions.

The South African Colonies. The Dutch were really the first people to settle permanently in South Africa, and the Roman-Dutch law is still the common law of all the British colonies and territories therein. The Cape of Good Hope was ceded to Britain in 1814. Natal, which had been occupied by Englishmen since 1824, was not formally declared a British colony till 1843. Both these colonies passed through the stage of Crown colonies. The Cape of Good Hope was the first to attain the position of a

self-governing colony. This it did in 1872.[1] It was not till 1893 that Natal came to occupy the same position in virtue of its Constitution Act of 1893.[2] Their constitutions are somewhat similar, and will be considered together.

The Constitutions of Cape Colony and Natal. Both colonies have a Parliament consisting of the Governor and two Houses. The Upper House is in each colony called the Legislative Council. The Lower House is called in Cape Colony the House of Assembly, and in Natal the Legislative Assembly.[3] Parliament must meet once at least every year.[4]

The Legislative Council. In Cape Colony the Legislative Council is elected,[5] but in Natal it consists of members nominated by the Governor in Council.[6] No person can be summoned as a member of the Natal Legislative Council unless (1) he is of the age of thirty years or more, (2) has resided in Natal for ten years, and (3) is the registered proprietor of immovable property within the colony of the net value of £500.[7] Each member so summoned holds his seat for ten years. Five of the senior members retire every five years. The initial difficulty of assigning priority was got over by drawing lots.[8] Members who retire are eligible for reappointment.[9] The number of members is now twelve, one having been added to represent Zululand. In addition to the member summoned from Zululand, five are summoned from within the counties of Durban, Victoria, Alexandra, and Alfred; three from within the counties of Pietermaritzburg

[1] The Constitution Ordinance Amendment Act, 1872, Act No. 1 of that year.

[2] Act No. 14 of 1893.

[3] Ordinance of Cape Colony (confirmed by Order in Council of March 11, 1853), sec. 1; and Natal Act, No. 14 of 1893, secs. 3, 6.

[4] Cape Colony Ordinance, *cit. supra*, sec. 77; Natal Act, No. 14 of 1893, sec. 12.

[5] Cape Colony Ordinance, *cit. supra*, sec. 2.

[6] Natal Act, No. 14 of 1893, sec. 14. [7] *Ibid.* sec. 15.

[8] *Ibid.* sec. 16. [9] *Ibid.* sec. 17.

and Umvoti; and three from within the counties of Weenan and Klip River. But not more than two members can be summoned from within any one county.[1] Any member may resign his seat, by writing under his hand, addressed to the Governor.[2]

In the Cape of Good Hope a member of the Legislative Council must be qualified to be registered as a voter. He must be of the age of thirty years or more. A high property qualification is necessary. No person can be a member of the Legislative Council of Cape Colony unless he is the owner, for his own use and benefit, of immovable property situate within the colony and of the clear value of £2,000, *or* unless his movable and immovable property together amount to the net value of £4,000.[3] A member may, by written notice addressed to the President of the Legislative Council, resign his seat.[4] The Chief Justice is *ex officio* President of the Legislative Council, and may take part in debates.[5] The President has a casting vote in case of an equal division.[6] The President of the Natal Legislative Council is appointed by the Governor, and may also take part in debates.[7]

The Legislative Council of Cape Colony consisted at first of fifteen elected members.[8] But an Act of 1874 provided for seven electoral provinces, each returning three members.[9] Three years later the Griqualand West Act added a member for that district,[10] and in 1895 one member more was added for Bechuanaland.[11] The Legislative Council now consists of twenty-three elected members. The franchise is the same as that in the case of the House of Assembly.[12] The members of the Legislative Council are elected for seven years,

[1] Natal Act, No, 14 of 1893, sec. 19. [2] *Ibid.* sec. 18.
[3] Sec. 33 of the Cape Colony Ordinance, *cit. supra.*
[4] *Ibid.* sec. 70. [5] *Ibid.* sec. 2. [6] *Ibid.* sec. 3.
[7] Natal Act, No. 14 of 1893, sec. 20.
[8] Sec. 2 of the Cape Colony Ordinance, *cit. supra.*
[9] Act, No. 18 of 1874. [10] Act, No. 39 of 1877.
[11] Act, No. 41 of 1895.
[12] See sec. 8 of the Cape Colony Ordinance, *cit. supra.*

but retire gradually at the expiration of a fixed period, the senior members then withdrawing, but being eligible for re-election.

The House of Assembly or Legislative Assembly. The qualification for membership in the House of Assembly in Cape Colony is the same as the qualification for a voter.[1] A member of the Legislative Assembly of Natal must also be a duly qualified and registered voter.[2] They must, therefore, be at least twenty-one years of age, and British subjects by birth or naturalization. They must also possess the necessary property qualification for the franchise. The disqualifications for membership and occasions for vacating seats, both in the Legislative Council and House of Assembly or Legislative Assembly, are the same in both colonies. No person can become, or continue to be, a member of either House, if he be, or become,

(1) unpossessed of the necessary property qualification; *or*
(2) absent from the House for a whole session; *or*
(3) an alien, or under allegiance to a foreign Power; *or*
(4) bankrupt or insolvent; *or*
(5) insane; *or*
(6) a holder of a place of profit under the Crown (other than a political office[3] or a commission in the army or navy), or a contractor with the Government; *or*
(7) convicted of treason or felony or other infamous crime; *or*
(8) a member of the other House.[4]

Members of the House of Assembly or Legislative As-

[1] See sec. 47 of the Cape Colony Ordinance, *cit. supra*,
[2] Clause 1 of Royal Charter of July 15, 1856, and Natal Act, No. 14 of 1893, sec. 23.
[3] Cape Colony Act, No. 1 of 1872, sec. 3.
[4] Cape Colony Ordinance (confirmed by Order in Council of March 11, 1853), secs. 8, 10, 33, 47, 65, 71, 72; Royal Charter of Natal of July 15, 1856, clauses 12, 13, and Natal Act, No. 14 of 1893, sec. 32.

sembly may resign by notice in writing addressed to the Speaker,[1] who is elected by the members of the Assembly.[2] In Cape Colony members of both Houses are paid one guinea a day, with fifteen shillings per day extra for not more than ninety days, if residing over fifteen miles from Capetown.[3] It was formerly the rule that speeches in the House of Assembly could only be made in English,[4] but now they may be made either in Dutch or in English.[5] The Natal members of the Legislative Council are not paid, but members of the Legislative Assembly receive £1 a day as travelling allowance, if resident more than two miles from the seat of government. The House of Assembly in Cape Colony lasts for five years, if not sooner dissolved by the Governor; while the Legislative Assembly for Natal sits for four years, subject to earlier dissolution.[6]

The Franchise. In Cape Colony the House of Assembly now consists of ninety-five members, representing the various towns and country districts, including the Transkeian territories. They are elected on the same franchise as the members of the Legislative Council. The franchise is now regulated by the Ballot and Franchise Act of 1892. In addition to the qualifications incidentally noticed at the beginning of the preceding section, no man is entitled to be registered as a voter, unless he is in possession of property worth £75, *or* in receipt of salary or wages not less than £50 a year. He must also be able to sign his name and write his address and occupation. Persons whose only property qualification is a share in tribal occupancy have been excluded from voting.[7] Voting is by ballot.

[1] Cape Colony Ordinance, *cit. supra*, sec. 70; Natal Act, No. 14 of 1893, sec. 35.

[2] Cape Colony Ordinance, *cit. supra*, sec. 63; Natal Act, No. 14 of 1893, sec. 28.

[3] Cape Act, No. 16 of 1888.

[4] Cape Colony Ordinance, *cit. supra*, sec. 89.

[5] See the Cape Colony Act, No. 1 of 1882.

[6] Cape Colony Ordinance, *cit. supra*, sec. 6; Natal Act, No. 14 of 1893, sec. 25.

[7] See Act, No. 41 of 1887.

The Legislative Assembly of Natal consists of forty-three members, returned by seventeen electoral districts. Zululand is now represented, two members being returned by it.[1] In addition to being of full age and a British subject by birth or naturalization, an elector must have one or other of the following qualifications, viz.: he must possess (1) property worth £50 in value, or (2) a rental from property of the annual value of £10, or (3) he must be a resident in the colony whose income (inclusive of allowances) is at least £8 a month.[2]

The suffrage, then, though not quite so democratic as in the Australian States or New Zealand, is sufficiently wide in both colonies to include nearly all the white people and practically to exclude many of the blacks.[3] Everywhere in South Africa, with a few exceptions, the latter outnumber white men. Indeed the chief political questions centre round native land rights. It is to be hoped that the rivalry between the Dutch and English, formerly a factor in political life, will now die a natural death. Lastly, there is plural voting in Cape Colony and Natal, *i. e.* an elector may vote in every electoral district in which he possesses the necessary qualifications. In Cape Colony there is also the system of block voting for members of the Legislative Council, and in Capetown for those of the House of Assembly also.[4] Every elector in a district is allowed as many votes as there are

[1] Natal Act, No. 10 of 1898.

[2] See Royal Charter of Natal of July 15, 1856, clause 11, as amended by the Law No. 2 of 1883.

[3] In 1897 the Natal Parliament passed an Act providing that no persons shall be electors who (not being of European origin) are natives or descendants in the male line of natives of countries which have not hitherto possessed elective representative institutions founded on the parliamentary franchise, unless they first obtain from the Governor in Council an order exempting them from the provisions of the Act. This excluded a number of Indian immigrants from the franchise.

[4] Constitution Ordinance (confirmed by Order in Council of March 11, 1853), secs. 40, 46.

members returnable by the district. He may either distribute them among the candidates, or "plump" for one.

The Privileges of Parliament. The Natal Constitution Act of 1893[1] provides that "it shall be lawful for the Legislature of the Colony by any Law to define the privileges, immunities, and powers to be held, enjoyed, and exercised by the Legislative Council and Legislative Assembly, and by the Members thereof respectively: Provided that no such privileges, immunities, or powers shall exceed those for the time being held, enjoyed, and exercised" by the British House of Commons and the members thereof. The Cape Colony Act (No. 1 of 1854) secures freedom of speech and debate in proceedings in Parliament, and gives summary protection to persons employed in the publication of parliamentary papers.

Powers of the two Houses. All money Bills must originate in the Lower House. Section 80 of the Cape of Good Hope Ordinance[2] provides that all Bills, appropriating the public revenue to the public service, must first be recommended to *the House of Assembly* by the Governor. Section 88 goes still further. It is enacted, "in regard to all bills relative to the granting of supplies to Her Majesty, or the imposition of any impost, rate, or pecuniary burden upon the inhabitants, *and which bills shall be of such a nature that if bills similar to them should be proposed to the Imperial Parliament of Great Britain and Ireland such bills would, by the law and custom of Parliament, be required to originate in the House of Commons, that all such bills shall originate in, or be by the Governor of Good Hope introduced into the House of Assembly of the said Colony.*" What is constitutional *practice* in England is thus made constitutional *law* in the Cape. But the same section also provides that "the Legislative Council of the said colony, and the Governor thereof, shall respectively have full power and authority *to make in all such bills such amendments*

[1] Act No. 14 of 1893. See sec. 42.
[2] Confirmed by Order in Council of March 11, 1853.

as the said Council and the said Governor shall respectively regard as needful or expedient; and the said Council and the said Governor may respectively return such bills, *so amended*, to the House of Assembly or the Legislative Council." Of course it would be unusual for the Governor now to make such amendments; for responsible government exists in Cape Colony.[1] But the Legislative Council can, and does, amend money Bills, chiefly, it is said, for getting grants to the electoral provinces which its members represent. There has been considerable friction over this. The position in Natal is simpler. As in the Cape of Good Hope, so in Natal money Bills must be brought in by the Legislative Assembly. Section 48 of the Constitution Act[2] provides that all Bills for appropriating any part of the Consolidated Revenue Fund, or for imposing, altering, or repealing any rate, tax, duty, or impost, must originate in the Legislative Assembly. But the Legislative Council, though it may reject, *cannot alter* any money Bill passed by the Legislative Assembly.[3] Appropriation Bills must of course be first recommended by the Governor to the Legislative Assembly.[4] Each House makes its own Rules and Standing Orders for the regulation and orderly conduct of its proceedings.

Legislative powers of Parliament. The Parliaments of Natal and Cape Colony have the general wide powers of legislation possessed by the other self-governing colonies. Their power of constitutional change seems quite unfettered, laws altering the constitution being passed in the same way and by the same body as ordinary laws. But they cannot pass laws which are (1) extra-territorial or (2) repugnant to British Acts of Parliament extending to these colonies.[5]

The Executive. Cape Colony and Natal are both administered by a Governor aided by an Executive Council,

[1] The Constitution Ordinance Amendment Act, No. 1 of 1872.
[2] No. 14 of 1893. [3] *Ibid.* sec. 49. [4] *Ibid.* sec. 50.
[5] See p. 9 above.

which is composed of the Ministry for the time being. In the Cape the Ministers are the Colonial Secretary, the Treasurer (who is at present the Premier), the Attorney-General, the Commissioner of Public Works, and the Secretary of Agriculture. In Natal they are six in number, namely, the Treasurer (who is also the Premier), the Colonial Secretary, the Minister of Justice (who is also Minister of Education), the Minister of Lands and Works, the Secretary of Native Affairs, and the Minister of Agriculture. The Governor is President of the Executive Council, but, as in other self-governing colonies, does not attend Cabinet meetings.

The Governor. The duties and powers of the Governor are similar to those in other self-governing colonies, subject of course to special instructions. Thus he summons, prorogues, and dissolves Parliament. But Parliament must meet once a year at least.[1] In Natal he can only dissolve the Legislative Assembly, not the Legislative Council.[2] But the Governor of the Cape of Good Hope can dissolve both the Legislative Council and House of Assembly, or dissolve the House of Assembly alone.[3] His powers of pardon and mode of exercising them are similar to those set forth in the case of Governors of the Australian States, *mutatis mutandis*. In the same way he assents or refuses assent to bills passed by Parliament, or reserves them for the Crown's assent, according to his Instructions and constitutional practice.[4]

The Cabinet System. Although the Cabinet System of government in both the South African colonies rests chiefly upon custom, certain features of it are enacted as *law* by the Natal Constitution Act. The preamble of the Constitution Act of Natal[5] recites that "it is expedient to

[1] See p. 141 above.

[2] Natal Act, No. 14 of 1893, secs. 13, 25.

[3] Cape Colony Ordinance, *cit. supra*, sec. 74; see Cape Colony Act, No. 9 of 1897.

[4] See chap. vi. above.

[5] Act No. 14 of 1893.

provide for the establishment of Responsible Government in Natal." Section 8 authorizes the Governor to designate such offices as he thinks fit, "not being more than six in number, to be *political* offices" for the purposes of the Act. Appointments to such offices are to be made by the Governor. The holders of these offices are called Ministers, and do not vacate their seats in the Legislative Council or Legislative Assembly by reason of appointment to or retention of any such office. This is a departure from the rule in the United Kingdom and most of the other self-governing colonies, in which members of the legislature, accepting political office, require re-election.[1] But two features of the English Cabinet System are enacted. The control of the Cabinet over the Public Service is recognized in the provision that appointments to all public offices under the Natal Government, save those liable to be vacated on political grounds, are vested in the Governor *in Council*.[2] Again, the rule that Ministers must be members of parliament is laid down in section 9. "Every Minister shall be, or shall within four months of the date of his appointment become, a Member of the Legislative Council or of the Legislative Assembly, but not more than two Ministers may be Members of the Legislative Council."[3] There is one peculiarity both in Natal and Cape Colony. Each Minister has a right to sit and speak in both Houses, but can vote only in the House of which he is a member.[4]

In Cape Colony the Cabinet System rests more upon *custom* than it does in Natal. It was introduced by the Constitution Ordinance Amendment Act,[5] the preamble of

[1] It is not the rule in the Commonwealth of Australia, or South Australia. See pp. 42, 86 above.

[2] Act No. 14 of 1893, sec. 53.

[3] *Cf.* the provision in the Australian Commonwealth, p. 71 above.

[4] Natal Act, No. 14 of 1893, sec. 10; and Cape Colony Constitution Ordinance Amendment Act of 1872, sec. 4.

[5] No. 1 of 1872.

which recites that "it is expedient, in order to the introduction of the system of executive administrations, commonly called Responsible Government, to amend in certain respects" the Constitution Ordinance of 1852.[1] Section 3 enacts that the following persons, holding offices of profit under the Crown, shall be eligible as members of the Legislative Council or of the House of Assembly, namely, the Colonial Secretary, the Treasurer of the Colony, the Attorney-General, the Commissioner of Crown Lands and Public Works, and the Secretary of State for Native Affairs. But beyond this provision it does not go, except that it provides for pensions for the then existing executive officers "*in the event of retirement on political grounds*,"[2] and enacts that the new executive officers created by the Act, namely, the Commissioner of Crown Lands and Public Lands, and the Secretary for Native Affairs, are to be appointed by the Crown and to hold office during its pleasure.[3]

Departments of State. The chief Departments of State are the following:—

The Department of the Colonial Secretary.
The Department of the Treasury.
The Department of Justice.
The Department of Public Works.
The Department of Agriculture.
The Department of Native Affairs.
The Department of Education.
The Department of Lands.

Each of these Departments has its permanent staff. The State does not fulfil so many functions as it does in Australia or New Zealand. In Cape Colony the State subsidizes schools, and gives grants to them. But there are no State schools.[4] In Natal there is a number of Government schools,

[1] Confirmed by Order in Council of March 11, 1853.
[2] *Ibid.* sec. 6. [3] *Ibid.* secs. 1, 2.
[4] An Education Bill is at present under the consideration of the Cape Parliament. It provides for the compulsory education of children of European parents.

and the State subsidizes many more. But there is no compulsory education. The Natal Government owns most, but not all of the railways, and the Cape Government owns some railways and grants aid to others. In Natal the natives live in tribes on locations marked out by the Government, and are specially looked after by the Secretary of Native Affairs.

The Judicature. The Supreme Court of Cape Colony consists of a Chief Justice and eight puisne Judges,[1] three of the latter being assigned to the Eastern districts and forming a Court there.[2] That Court exercises a jurisdiction concurrent with the Supreme Court in the Eastern Districts of the Cape, such as the territories of Transkei, Tembuland Proper, Griqualand East, etc.[3] Its jurisdiction is the same as if it were a Circuit Court in the Eastern Districts in regard to certain matters,[4] *e.g.* insolvency, registration of lands, probate, administration of estates of deceased persons, minors, and lunatics, recovery of rents, etc.[5] In addition to the Court of the Eastern Districts, there is another High Court, consisting of three puisne Judges of the Supreme Court, who exercise concurrent jurisdiction with the Supreme Court over all cases arising, and persons residing in Griqualand West and British Bechuanaland.[6] The Court of Appeal consists of the Judges of the Supreme Court assigned to Cape Town. It includes the Chief Justice. It hears appeals from the Court of the Eastern Districts and the High Court, and may be increased in numbers from Judges of these Courts.[7] It is expressly enacted that an appeal to the Privy Council shall be allowed by the Supreme Court sitting as a Court of Appeal against any final judgment thereof in any civil suit in which an appeal is now allowed from the Supreme Court by the Charter of Justice.[8] The Court of Appeal also hears appeals

1 Act No. 35 of 1896, sec. 3.
2 *Ibia.* sec. 10.
3 *Ibia.* sec. 13.
4 *Ibia.* sec. 14.
5 See Ordinances, Nos. 6, 97, 104, 105 of 1843; Nos. 9 and 15 of 1844; No. 5 of 1848; and Act No. 1 of 1854.
6 Act No. 35 of 1896, secs. 15, 18.
7 *Ibia.* secs. 19, 20.
8 *Ibia.* sec. 22.

in criminal cases, chiefly on questions of law or irregularity in proceedings.[1] Under the Matabeleland Order in Council of 1894 the Supreme Court hears appeals in civil cases from the High Court of Matabeleland involving an amount at stake of more than £100.[2] The Attorney-General, or a person appointed by him, prosecutes in all criminal cases in the Superior Courts, especially at Capetown. In the Eastern Districts the Solicitor-General usually prosecutes, and in Griqualand West and Bechuanaland such prosecution is now left to the Crown Prosecutor.[3]

In Natal the Supreme Court consists of a Chief-Justice, who is also Judge of the Vice-Admiralty Court, and two puisne Judges. In self-governing colonies such Judges are practically always appointed from the local bar, but one of the puisne Judges in Natal, recently appointed, was a member of the Scottish Bar practising in Edinburgh. There is a Native High Court, consisting of a President and two Judges, which administers civil justice among the natives.[4] The ordinary criminal law of the colony extends to them, except as regards crimes triable under native law or custom, and political crimes. There are also magistrates for the different districts. The Judges of the Supreme Court and Native High Court may be removed by the Crown upon the address of both Houses of the Natal Parliament.[5] They hold office during good behaviour.[6] This is the case also in Cape Colony.

Naval and Military Defence. There is an Admiralty establishment at Simon's Bay in Cape Colony, and imperial garrisons at Capetown and Wynberg. These are under the direct control of the Home Government. Table Bay is also strongly fortified at the joint expense of the British War Office and Cape Colony. The Burgher Forces and Levies Act[7] provides for a militia constituted of all the

[1] Act No. 35 of 1896, secs. 29–34.
[2] *Ibid.* secs. 44–6.
[3] *Ibid.* sec. 58.
[4] Act No. 49 of 1898.
[5] Act No. 14 of 1893, sec. 42.
[6] *Ibid.* sec. 43.
[7] Act No. 7 of 1878.

male inhabitants between the ages of eighteen and fifty, with certain exemptions, such as clergymen, etc. But such compulsory power is not used, and the local forces, consisting of the Cape Mounted Riflemen and the Cape police, are recruited by voluntary enlistment. There are also volunteer and cadet corps maintained by a capitation grant. In Natal there is compulsory military training for all boys over ten years of age attending the Government schools. The cadet corps is composed of them. Natal has also an armed and mounted police force, in addition to volunteers. But there are no compulsory powers in the Natal Military Acts in respect to a militia. In both colonies the local forces are under the control of the respective Parliaments thereof.

This concludes our examination of the self-governing colonies, and of all possessions which are colonies. In the next chapter we pass to a different class of possessions.

PART III

POSSESSIONS WHICH ARE NOT COLONIES

CHAPTER XIII

The Channel Islands and the Isle of Man

We now turn to those British possessions which do not come under the statutory definition of a "colony." They are three in number, namely, the Channel Islands, the Isle of Man, and British India.[1] In this chapter we shall confine our attention to the Channel Islands and the Isle of Man, leaving British India to a chapter by itself.

The Channel Islands. The Channel Islands are four in number, namely, Guernsey, Jersey, Alderney and Sark. Along with the Isle of Man they constitute the oldest of the British possessions. Guernsey and Jersey are the "predominant partners," Sark and Alderney being both within the jurisdiction of the former. Governors are appointed by the Crown (acting on the advice of the Home Secretary, who is responsible for the government of the Channel Islands) for Guernsey and Jersey. Each of these two islands has its own legislature and its own executive. The legislature is called the States, and is partly elected and partly nominated by the Crown. Some of the elected members sit for life, while others are only elected for a period. The franchise is not a broad one. The States of Guernsey legislate for Alderney, although the latter has States of its own. The States of Jersey can make a law without the royal assent. But such a law only lasts for three years, and requires the Governor's assent. In each island there is a Court consisting of a Bailiff nominated by the Crown and

[1] See p. 8 above.

twelve Jurats elected for life by inhabitants possessing the franchise. Appeals from the Court of Alderney lie to the Court of Guernsey. Appeals from the other Courts go to the Judicial Committee of the Privy Council. In each island there are special laws, mostly old Norman French. The Crown has claimed the right to legislate for the Channel Islands by Orders in Council. The validity of such a right is a matter of doubt, unless the States have consented.[1] Acts of Parliament intended to apply to the Channel Islands are in practice extended to them by Order in Council. Otherwise they are not bound by such Acts unless the Acts expressly include them.

The Isle of Man. The Isle of Man enjoys complete home rule. Legislative power resides in the Court of Tynwald, which has two Chambers, the Council and the House of Keys. The Council is the upper chamber, and all its members, except the Vicar-General, are nominated by the Crown. These members are the Governor, the Bishop, the Attorney-General, the Clerk of the Rolls, the two Deemsters or Judges, the Archdeacon, the Receiver-General, and the Vicar-General. The last named is appointed by the Bishop. The House of Keys, or lower chamber, has twenty-four members who are elected by the people. There is a property qualification for the franchise, namely, the ownership or occupation of property of the value of £4. Unmarried women and widows are entitled to vote. Like the House of Commons the House of Keys exercises the chief sway in legislation. After a law has been passed both in the House of Keys and in the Council, it is signed at a meeting of both chambers held by the Governor, and *must* be signed by a majority of the members of the House of Keys. It must then be submitted for the Crown's assent in Council, and is afterwards formally proclaimed law by the Court of Tynwald. The Governor constitutes the

[1] *In the Matter of the States of Jersey*, 9 Moo. P.C. (N.S.), 184, 262.

sole executive without any ministers. But his administration is controlled by the Home Secretary, and the Treasury Office supervises financial matters.[1] Justice is administered by the Governor and the two Deemsters, and appeals go to the Judicial Committee of the Privy Council. An Act of the British Parliament has force in the Isle of Man only if it extends to it, either expressly or by necessary implication.

[1] Walpole, *The Land of Home Rule*, pp. 270-9.

CHAPTER XIV

British India

The East India Company. The East India Company was founded in 1600, receiving a Charter from Queen Elizabeth which conferred upon it exclusive rights of settlement, government, and trade in the East. Like most Chartered Companies it did not let the grass grow under its feet. Within two centuries it had, despite fierce competition, obtained the most important parts of India. It had an army and a kind of navy of its own. It acquired powers of sovereignty from native Princes. At last it dawned upon the British Government that matters had gone far enough. So in 1794 Pitt's Act[1] was passed, placing the civil and military control of the Company's possessions under a Board of Control. This Board of Control consisted of the Chancellor of the Exchequer, one of the Secretaries of State, and four members of the Privy Council. The Company retained all its trading privileges and its vast patronage, although the nomination of the highest officers was subject to the Crown's assent. But the Directors of the Company could recall a Governor-General without asking leave of the Crown, and the Company was allowed to make treaties with Indian Princes. This system of dual government continued for over sixty years, although amended from time to time by piecemeal legislation. In 1833 the Company lost its exclusive privileges of trade by the Charter Act[2]

[1] 24 Geo. III. c. 25. [2] 3 & 4 Wm. IV. c. 85.

passed in that year. But it still retained political powers, including that of patronage. Then occurred the Indian Mutiny of 1857, which resulted in the transference of the whole government of India to the Crown. An Act was passed to this effect in 1858,[1] which has determined in its main outlines the constitution of India. Many prior Acts remain unrepealed, and many subsequent ones have been passed. They will be found in an edition of two volumes of imperial statutes applying to India, which is periodically revised and brought up to date by the Legislative Department of the Indian Government.

British India. *British India*, which alone concerns us here, must be distinguished from *India*. According to section 18, sub-section 4, of the Interpretation Act, 1889,[2] *British India* includes all territories and places within the Crown's dominions which are for the time being governed by the Crown through the Governor-General of India, or through any governor or other officer subordinate to the Governor-General of India. *India* includes, in addition to this, the territories of any native prince or chief under the suzerainty, that is to say, protection, of the Crown exercised through the Governor-General of India, or through any governor or other officer subordinate to the Governor-General of India.[3] Thus Aden forms part of British India. But the Nizam's Dominions, although in India as geographically known, are not part of British India. They are administered on behalf of the Nizam. There are more than six hundred Native States which are dependencies of British India, varying in size from the Nizam's Dominions of 83,000 square miles with a population of 11,500,000 to a few acres belonging to a petty chief in Kathiawar. British India has therefore a unique position among all other British possessions. Although a dependency of Britain, it has itself dependencies. "This imperial position was recognized

[1] 21 & 22 Vict. c. 106.
[2] 52 & 53 Vict. c. 63.
[3] *Ibid.* sec. 18, sub-sec. 5.

in the title of Empress of India (translated in India into Kaiser-i-Hind) assumed by Queen Victoria in 1876."[1]

The Council of the Secretary of State for India. We have seen that the British Government exercises the supreme executive power in the British possessions through its various Secretaries of State, and that the Secretary of State for India is responsible for the government of India.[2] But there is one peculiarity about India. Unlike other Secretaries of State, the Secretary of State for India has a Council to advise him. This Council consists of not less than ten nor more than fifteen members, who are appointed by him, and hold office for ten years. Nine of them at least must have resided or served in British India for ten years or more.[3] The Secretary of State for India is president of the Council. By section 22 of the Government of India Act, 1858,[4] the Council must meet once at least every week. The Secretary of State must lay before it all orders and communications affecting India,[5] except matters of urgency,[6] or secrecy, *e.g.* orders concerning war or peace or negotiations with any prince or State.[7] Generally speaking, the Secretary of State for India can overrule the whole Council. But he must do some things *in* Council, *i.e.* at a meeting of the Council, and other things *with* the sanction of a majority of the Council. Examples of the latter are appropriation of revenues or property,[8] Indian appointments,[9] regulation of furlough rules.[10] If any order is sent to India directing the commencement of hostilities in India, it must be communicated to Parliament within three months after its dispatch, or, if Parliament is not sitting at the end of these three months, then within one month after the next meeting

[1] Jenkyns, *British Rule and Jurisdiction beyond the Seas*, p. 44.
[2] See p. 21 above.
[3] 21 & 22 Vict. c. 106, secs. 7, 10; 32 & 33 Vict. c. 97, secs. 1–3; 52 & 53 Vict. c. 65, sec. 1.
[4] 21 & 22 Vict. c. 106.
[5] *Ibid.* secs. 24, 25.
[6] *Ibid.* sec. 26.
[7] *Ibid.* secs. 27–8.
[8] *Ibid.* sec. 41.
[9] *Ibia.* secs. 30, 37.
[10] 16 & 17 Vict. c. 95, sec. 32.

of Parliament.[1] "The Council is thus a consultative body, without any power of initiation, and with a very limited power of veto."[2] But the Secretary of State for India is of course responsible to Parliament for all his acts.

Parliamentary Control over India. The British Parliament may of course legislate for India, as it may for any other possession. But British India is to some extent treated in constitutional practice like a self-governing colony. The Indian Secretary is a member of the Cabinet which must possess the confidence of the House of Commons. But he is paid from the Indian revenue, and so his policy, unlike that of the Colonial Secretary, whose salary is annually voted by Parliament and whose policy can then be fully discussed, is never really debated. The Indian Budget, *i. e.* its annual income and expenditure, is submitted near the end of the session, when no effective discussion takes place. In view of the importance of British India, this arrangement seems unsatisfactory.

We must now turn from the home supervision of the government of British India to the actual government in British India itself, but in passing may note that all the revenues of India are received for and in the name of the King, and must be applied exclusively for the purposes of the Government in British India.[3]

The Governor-General of India in Council. The superintendence, direction, and control of both the civil and military government of British India is vested in the Governor-General in Council, *i. e.* the Governor-General of India acting in conjunction with his Council.[4] But this is subject to directions from the Secretary of State for India.[5]

[1] 21 & 22 Vict. c. 106, sec. 54.
[2] Ilbert, *Government of India*, p. 113.
[3] 21 & 22 Vict. c. 106, secs. 2, 42.
[4] 3 & 4 Wm. IV. c. 85, sec. 39.
[5] See Warrant of Appointment of the Viceroy and Governor-General of India, printed in Sir Courtenay Ilbert's *Government of India*, p. 574 and p. 575.

The Governor-General is appointed by the Crown under the Royal Sign Manual, and generally holds office for five years. He is not a governor with strictly limited authority. He is a viceroy, *i. e.* a representative of the Crown in the strict sense of the term. In other words, he possesses general sovereign power.

His Council consists of six members. The Indian Councils Act, 1874,[1] gave power to appoint a member for public works, but this power was never exercised.[2]

The six members of the Council are appointed by the Home Government, and three of them must have served the Crown for at least ten years in India. One member, called the law member, must be an advocate or barrister of not less than five years' standing. The Commander-in-Chief of the Forces in India may be, and always is, appointed an extraordinary member of the Council. The Governors of Madras and Bombay would also be extraordinary members if the Council ever met within these Presidencies.[3] The ordinary members are usually appointed for five years.

The Governor-General is in all ordinary circumstances bound to abide by the opinion of the majority of the Council, and has a casting vote in the case of equal division of opinion.[4] But section 5 of the Government of India Act, 1870,[5] provides that "whenever any measure shall be proposed before the Governor-General of India in Council, whereby the safety, tranquillity, or interests of the British possessions in India, or any part thereof, are or may be, in the judgment of the said Governor-General, essentially affected, and he shall be of opinion either that the measure proposed might be adopted and carried into execution, or that it ought to be suspended

[1] 37 & 38 Vict. c. 91. See secs. 1, 2, which have been amended by 4 Edw. VII. c. 26.

[2] It has been exercised in virtue of 4 Edw. VII. c. 26, for the establishment of a separate Department of Commerce. Prior to this the Council consisted of five ordinary members.

[3] 24 & 25 Vict. c. 67, secs. 3, 9.

[4] 3 & 4 Wm. IV. c. 85, sec. 48. [5] 33 & 34 Vict. c. 3.

or rejected, and the majority in Council then present shall dissent from such opinion, the Governor-General may, on his own authority and responsibility, suspend or reject the measure in part or in whole, or adopt or carry it into execution; but in every such case two members of the dissentient majority may require that the said suspension, rejection, or adoption, as well as the fact of their dissent, shall be notified to the Secretary of State for India; and such notification shall be accompanied by copies of the minutes (if any) which the members of the Council shall have recorded on the subject." By section 6 of the Indian Councils Act, 1861,[1] the Governor-General may, in the event of his absence from head-quarters, appoint a president of the Council with all the powers of the Governor-General, except his legislative powers, or the Governor-General himself may be invested alone by the Council with all or any of the powers exercisable by the Governor-General in Council. The Governor-General and Council hold both executive and legislative meetings.

Executive powers of the Governor-General in Council. The executive powers of the Governor-General in Council are very wide. The whole sovereignty of British India is delegated to the Governor-General acting with his Council. Along with his Council, he has the power of pardon, of making treaties with Asiatic States, and of acquiring and ceding territory. "Moreover, the Government of India[2] has powers, rights, and privileges derived, not from the English Crown, but from the native princes of India, whose rule it has superseded."[3]

Departments of the Indian Government. For executive purposes the Indian Government is divided into eight departments, viz.:—

The Home Department.
The Foreign Department.
The Finance Department.

[1] 24 & 25 Vict. c. 67.
[2] The Government of India here means the Governor-General in Council. [3] Ilbert, *Government of India*, p. 179. See p. 160 above.

The Military Department.
The Department of Public Works.
The Department of Revenue and Agriculture.
The Legislative Department.
The Department of Commerce and Industry.

Each of these departments is assigned to the special supervision of one of the members of the Governor-General's Council. The Governor-General himself looks after the Foreign Department. The Department of Revenue and Agriculture is looked after by the member of Council who has charge of the Home Department. Each department has a permanent secretary and staff. "Minor executive questions are settled departmentally. Questions involving a difference of opinion between two departments, or raising any grave issue, are brought up to be settled in Council." [1]

The Indian Army. The Indian Army is under the control of the Governor-General in Council,[2] coming under the special administration of the member of Council who looks after the Military Department. Subject to this supervision, the Commander-in-Chief is the chief executive officer. Although he must obey the instructions of the Governor-General in Council, he is in purely military affairs independent and responsible to the British Government only.

The Indian army consists partly of British forces sent to India, and partly of native forces raised in India but officered by British officers. The British troops and officers are under the British military law, while the native troops are subject to Indian military law. An Act passed in 1860 [3] prohibits the Indian Government from raising a separate army of Europeans, and the Governor-General has no express power to grant commissions in the army.[4] It has been held that such a power cannot be implied.[5] The army is divided into three

[1] Ilbert, *Government of India*, p. 116.
[2] 3 & 4 Wm. IV. c. 85, sec. 39.
[3] 23 & 24 Vict. c. 100.
[4] Ilbert, *Government of India*, pp. 271–5.
[5] *Bradley* v. *Arthur*, 2 St. Tri. (N.S.), 171.

main divisions, each under a lieutenant-general, the whole being under the Commander-in-Chief.[1]

The Legislative Council of India. In addition to meeting for executive purposes, the Governor-General and Council hold separate meetings for legislation. But when they meet to make laws, additional members are added to the Council. What may be called the Legislative Council is thus simply an expansion of the Executive Council. This expansion consists in adding to the ordinary Council not less than ten nor more than sixteen additional members. At least one-half of such additional members must not be in the civil or military service of the Crown in India. They are nominated by the Governor-General in accordance with regulations made by him in Council and approved of by the Secretary of State for India in Council.[2] The rules provide that nominations to four seats shall be made by the Governor-General on the recommendations of the non-official members of the councils of Madras, Bombay, Bengal, and the United Provinces of Agra and Oudh respectively, and one on that of the Calcutta Chamber of Commerce. The number of additional members is at present sixteen, and they hold office for two years. They only attend meetings for the purpose of making laws. But the Indian Councils Act, 1892,[3] has enabled rules to be made allowing the discussion of the annual financial statement, and such rules have been made.[4]

Legislative powers of the Governor-General in Council. The Governor-General together with his Council as thus extended has a legislative power which has

[1] These three divisions are known as the Northern, Western, and Eastern Army Corps. The late Madras Command is governed directly from the Army Headquarters. But there is still a Burma Command.

[2] The Rules are printed in Ilbert, *Government of India*, pp. 337–9. See 24 & 25 Vict. c. 67, secs. 9–11; 33 & 34 Vict. c. 3, sec. 3; 55 & 56 Vict. c. 14, sec. 1.

[3] 55 & 56 Vict. c. 14.

[4] See Ilbert, *Government of India*, pp. 348–350, where such rules are printed.

been conferred upon him by a series of imperial Acts.[1] Such legislative authority, as summarized by Sir Courtenay Ilbert, extends to making laws—

(*a*) "for all persons, for all courts, and for all places and things within British India; *and*

(*b*) for all British subjects of His Majesty and servants of the Government of India within other parts of India, that is to say, within the Native States; *and*

(*c*) for all persons being native Indian subjects of His Majesty, or native Indian officers or soldiers in His Majesty's Indian forces when in any part of the world, whether within or without His Majesty's dominions; *and*

(*d*) for all persons employed or serving in the Indian Marine Service."[2]

But the Governor-General in Council cannot pass any law—

(*a*) affecting the authority of the imperial Parliament, or any part of the unwritten laws or constitution of the United Kingdom whereon may depend in any degree the allegiance of any person to the Crown of the United Kingdom, or the sovereignty or dominion of the Crown over any part of India; *or*

(*b*) altering the constitution of the Indian Government; *or*

(*c*) enabling Indian loans to be raised in the United Kingdom—a thing which cannot be done without the consent of the British Parliament; *or*

(*d*) repugnant to any imperial Act extending to India, and passed after 1860.[3]

The assent of the Governor-General is of course necessary

[1] See 3 & 4 Wm. IV. c. 85; 24 & 25 Vict. c. 67; 28 & 29 Vict. c. 17; 32 & 33 Vict. c. 98; 33 & 34 Vict. c. 3; 47 & 48 Vict. c. 38; 55 & 56 Vict. c. 14.

[2] *Government of India*, p. 119.

[3] 24 & 25 Vict. c. 67, sec. 22.

to every law passed at a legislative meeting of the Council. Instead of assenting or refusing assent to any proposed law, the Governor-General may, like any other Governor, reserve it for the Crown's assent. In that case it does not become law till the Crown has signified its assent, *not* through the Crown in Council, but through the Secretary of State for India in Council.[1] The Crown may also disallow laws passed by the Governor-General in Council.[2] Section 19 of the Indian Councils Act, 1861,[3] provides that proposed laws relating to the public revenue or debt, religion, military or naval affairs, or foreign relations, cannot be introduced by any member of the Council at a legislative meeting without the sanction of the Governor-General. Section 23 of the same Act permits the Governor-General by himself alone to make laws in the case of emergency, but such laws are only to last for six months.

Local Government in India. So far we have been discussing the supreme central legislature and executive in India. But British India is of course too vast a country to be governed in detail from one centre. So there exist local legislatures and executives, the government of British India being in many respects federal in character.

Local Legislatures. The local legislatures are six in number, existing in Madras, Bombay, Bengal; the United Provinces of Agra and Oudh, the Punjab, and Burma. In the Presidencies of Madras and Bombay the ordinary Councils of the Governors of these provinces are enlarged for legislative purposes by an addition of not less than eight nor more than twenty extra members, among whom must be included the Advocate-General of the province, and of whom at least one-half must be persons not in the service of the Crown. These additional members are nominated by the Governor of the province according to rules framed by the Governor-General in Council and approved of by the

[1] 24 & 25 Vict. c. 67, sec. 20.
[2] *Ibid.* sec. 21.
[3] 24 & 25 Vict. c. 67.

Secretary of State for India in Council.[1] The rules aim at giving a representative character to the members nominated. Thus one of the members of the legislative council of Madras is recommended for nomination by the Madras Corporation, another by the Senate of the University of Madras, and so on. Similar regulations apply to the legislative councils of the other four provinces where there is no executive council but only a Lieutenant-Governor.

Legislative powers of Local Legislatures. Local legislatures have naturally more limited legislative powers than the Governor-General in Council. Their function is to make laws for a province on *local* matters. Anything *national* in importance or character is beyond their scope. But the Indian Councils Act, 1892,[2] gave power to local legislatures, with the previous sanction of the Governor-General, to repeal or otherwise alter laws or regulations of the Governor-General in Council affecting their province. They cannot, however, alter an imperial Act in force in the province, nor can they, without the previous consent of the Governor-General, make any law affecting (i.) the public debt, customs, or general revenue of India, or (ii.) the currency, or (iii.) the post office, or (iv.) the Indian Penal Code, or (v.) religion, or (vi.) naval or military matters, or (vii.) patents or copyrights, or (viii.) the relations of the Government with foreign states.[3]

A law passed by a local legislature requires the assent of the Governor or Lieutenant-Governor of the province, and in addition the assent of the Governor-General. But even when thus assented to, such a law may be disallowed by the Crown.

Summary Legislation. The Government of India Act, 1870,[4] gives power to the Governor-General of India

[1] These Rules are printed in Ilbert, *Government of India*, at pp. 339 *et seq.*

[2] 55 & 56 Vict. c. 14. See sec. 5.

[3] 24 & 25 Vict. c. 67, secs. 42–8; 55 & 56 Vict. c. 14, sec. 5.

[4] 33 & 34 Vict. c. 3.

to legislate in a summary manner for the less civilized parts of India. If the Secretary of State for India in Council declares the provisions of section 1 of the Act applicable to a particular part of some British Indian province, the Governor in Council, Lieutenant-Governor or Chief Commissioner of the province, may propose to the Governor-General in Council draft rules for the peace, order, and good government of that part. If these draft rules are passed by the Governor-General in Council, they become law.

The Central Legislature and Local Legislatures. Provinces which have legislatures are generally left to make laws for themselves. But this home rule cannot of course extend to matters beyond the competence of the local legislature or requiring to be dealt with throughout India on a uniform system or plan. Provinces which have no legislatures have laws made for them by the central legislature.

Local Executives. British India is, for administrative purposes, divided into eight large provinces and a number of minor ones. The large provinces are Bengal, Bombay, Madras, the United Provinces of Agra and Oudh, the Punjab, Burma, Assam, and the Central Provinces; while examples of minor ones are Ajmere, the Andaman Islands, British Baluchistan, and Coorg.[1] Bombay and Madras are each governed by a Governor and a Council appointed by the Crown. The Council is composed of two members of the Indian Civil Service of twelve years' standing. Bengal and the United Provinces of Agra and Oudh are each administered by a Lieutenant-Governor, who has no executive council but is assisted by a Board of Revenue. In the Punjab and Burma the Lieutenant-Governor is aided by financial commissioners. These Lieutenant-Governors are appointed by the Governor-General, with the approval of the Crown, from the Indian Civil Service, and, like the Governors and members of the

[1] These are really *quasi*-provinces, being under the immediate control of the Governor-General. Another minor province is the North-West Frontier Province constituted in 1901. In all there are fourteen provinces.

Councils of Bombay and Madras, hold office for five years. Assam, British Baluchistan, and the Central Provinces are each administered by a Chief Commissioner, appointed by the Governor-General in Council, and the same system prevails in the Andaman Islands, Ajmere, and Coorg.

Most of the provinces are divided into divisions which are under the care of Commissioners, and these divisions are subdivided into districts. "The most important unit of administration throughout British India is the district, at the head of which is an officer, called in the old regulation provinces the collector, and in the non-regulation provinces the deputy commissioner."[1] "Regulation provinces" were those provinces in the old days for which regulations were formally made by the Governor-General in Council under the Charter Acts. For "non-regulation provinces" the mode of legislation was by executive order. The province is the largest unit of administration, while the district is the smallest. The Collector or Deputy Commissioner, who is the head of the district, has many or few subordinates according to its size. In each province there is a secretariat through whom the Governor or Lieutenant-Governor or Chief Commissioner issues his orders to the District Officers, and through whom the District Officers send back to him their many reports.

The Indian Civil Service. British India is administered by a permanent Civil Service, divided into two branches, namely, (1) an imperial service recruited by open competition in Britain and (2) a provincial service recruited in each of the principal Indian provinces mostly by natives. All the more important posts are reserved to the first branch.[2] The necessity for a highly-organized permanent civil service is apparent, when we remember "the difference between the duties of the State in India and in England. In England

[1] Ilbert, *Government of India*, p. 136. There are nearly 250 districts in India.

[2] 24 & 25 Vict. c. 54.

the State conducts the business of the post office and the telegraphs, but nothing else. The Indian State is the owner of the entire country, a great manufacturer of opium and salt, a maker and worker of railways and canals, a maker of roads and bridges—and generally, the promoter of all kinds of material improvement."[1] Administration in India means therefore very much more than executing the law. Yet the staff of Englishmen in the Civil Service is small. "Roughly speaking, less than one thousand Englishmen, including military officers and others, are employed in the civil government of two hundred and twenty-one millions of people, and in the partial control of sixty-seven millions more."[2]

Municipal Institutions. It is a trite observation to say that British India resembles a continent and that in many ways it is stationary. But the present generation has witnessed a growth of representative municipal institutions, which are valuable means of expressing native views on problems of government, especially on local taxation. There are almost four thousand elected members of municipalities, in addition to thousands more of elected members of rural district boards. Natives practise as barristers, and a number are Judges of the Supreme Courts. Natives have obtained seats on the Provincial Councils and the Council of the Governor-General. National Congresses have been held from time to time to express the united views of Indians of all kinds, and the question of self-government of India by the natives may in time come to be a serious political problem. While that problem cannot be discussed here, it may be observed that its solution need not necessarily take the form of our own parliamentary system. Indians differ very much from us, and the suitable political institutions for each party may likewise differ.

The Indian Revenue. The revenue of India is mainly derived from (*a*) the customs duties, (*b*) the excise

[1] *Colonies and Dependencies*, by J. S. Cotton and E. J. Payne, p. 49.
[2] Ilbert, *Government of India*, p. 128, footnote (1).

taxes on liquor and salt, (*c*) stamp duties, (*d*) a large (but diminishing) profit on opium manufacture, (*e*) rent from lands, (*f*) profits derived from State-aided railways and other public works. But the expenditure is heavy, though not nearly so heavy as that of some European States. Part of its expenditure is upon public works which return a fair interest. Then the Indian Army and administration generally require to be kept up, and interest has to be paid on its public debt. The expenditure of the Indian revenues is under the control of the Secretary of State for India and his Council, and, as we have seen, the Annual Budget of India is brought before Parliament every session. An auditor of the India Office audits the Indian revenues and expenditure.

The Indian Judicature. The Indian High Courts Act, 1861,[1] empowered the Queen to establish by Letters Patent High Courts of Judicature in Calcutta, Madras, and Bombay, and to establish another High Court with the same constitution and powers. This last was created for the United Provinces of Agra and Oudh at Allahabad. The Judges of these four High Courts are appointed by the Crown and hold office during its pleasure.[2] Each High Court consists of a Chief Justice and as many Judges, not exceeding fifteen, as the Crown may appoint. One-third of the Judges of each High Court must be barristers or advocates of the United Kingdom of at least five years' standing, and one-third must be members of the Indian Civil Service of not less than ten years' standing, and having for at least three years served as or exercised the powers of a district Judge.[3] In the other provinces outside the jurisdiction of these four High Courts, there exists a Judicial Commissioner who has the same functions. But in the Punjab there is a Chief Court with four or five Judges. These all have an original jurisdiction both in civil and criminal matters within the limits of their province, and act as courts of appeal from the local courts. They also exercise a general superintendence over the local courts.[4] The local

[1] 24 & 25 Vict. c. 104.
[2] *Ibid.* secs. 2, 4.
[3] *Ibid.* secs. 2, 19.
[4] Sir John Strachey, *India*, p. 78.

courts are too numerous to mention in detail. Thus there are no less than three different courts of magistrates in criminal cases. In Bengal, the United Provinces of Agra and Oudh, and Assam there are four classes of civil courts, while the number rises to six in Lower Burma, and to eight in the Central Provinces. The decision of a High Court is generally final in criminal cases, but in certain cases, such as judgments made in the exercise of original criminal jurisdiction, or in any criminal case where any points of law have been reserved for the opinion of the High Court by any court which has exercised any original criminal jurisdiction,[1] an appeal lies to the Judicial Committee of the Privy Council. In civil cases an appeal is, generally speaking, only allowed if the sum at stake is not less than 10,000 rupees.

Indian Law. Criminal law and procedure has been made uniform throughout India by its codification in the Indian Penal Code and the Indian Code of Criminal Procedure. Procedure in civil cases has been codified by the Indian Code of Civil Procedure. Native law has also to some extent been superseded in civil matters by the Indian Contract Act, a rather unhappy specimen of codification. The Indian Evidence Act has codified the law relating to evidence. The Indian Succession Act of 1865 applies almost exclusively to Europeans. British India has adopted codification to a larger extent than any other British possession; for in additon to the Acts already mentioned there exist the Specific Relief Act, the Transfer of Property Act, and the Councils Act. But the different native systems of law, such as the Hindu, the Mohammedan, etc., regulate family law, succession, and inheritance among the natives. The law relating to torts or civil wrongs is practically English law. One peculiarity requires notice. The highest officials in India are in several respects not amenable to the jurisdiction of the Indian courts. But they can be tried by

[1] Letters Patent for the High Court of Judicature at Fort William in Bengal, dated December 28, 1865, sec. 41. They are printed in Ilbert's *Government of India*, chap. v. See p. 370.

the High Court in London for certain offences, namely, (*a*) oppression of any subject of the Crown,[1] (*b*) wilful disobedience or neglect of orders from the Secretary of State for India,[2] (*c*) wilful breach of trust and duty of office,[3] (*d*) trading,[4] (*e*) receiving presents.[5] This is a marked divergence from the constitutional rule which obtains in other British possessions, namely, that no one is exempt from the jurisdiction of the local courts.[6]

[1] 10 Geo. III. c. 47, sec. 4, as amended by 13 Geo. III. c. 63, sec. 39.
[2] 3 & 4 Wm. IV. c. 85, sec. 80. [3] *Ibid.*
[4] 33 Geo. III. c. 52, sec. 137; 3 & 4 Wm. IV. c. 85, sec. 76.
[5] 3 & 4 Wm. IV. c. 85, sec. 76.
[6] See pp. 23–4 above.

CONCLUSION

The British Empire is not a Federation. The United Kingdom exercises legal sovereignty over all her possessions and dominions. In that sovereignty no possession, whether it be self-governing or not, has any share. They are merely dependencies—parts of an Empire, with no say in the government of the whole. But, as we have seen, the self-governing colonies are *in constitutional practice* regarded more like States in a Federal Union than subordinate members of an Empire. At the same time constitutional practice has not gone so far as to allow them any direct influence in the guidance of imperial policy. What then is to be the nature of the future relations between the United Kingdom and her self-governing colonies or possessions? This is the main problem implied in "Imperial Federation."

That problem cannot be discussed here. The plans sketched for the future British Empire have been almost as numerous as the Constitutions of France. The question is undoubtedly one of the gravest in British politics. Momentous issues depend upon its proper solution. But while the problem may be said to have naturally arisen out of the growth of our constitutional practice, that constitutional growth is already developing the means to a practical solution of the problem.

In 1887 the first Colonial Conference was held in England, which was attended by delegates from all the self-governing colonies and by some representatives from the important Crown colonies. The chief question at that Conference was the organization of colonial defence. It was ultimately agreed

that a British commanding officer should go round the different colonies for inspection purposes. This was done. In 1894 another Conference of delegates from eight self-governing colonies in South Africa, Australasia and North America met at Ottawa to discuss matters which affected the unity and development of the Empire at large. At the Coronation of the present King opportunity was again afforded for a Conference of colonial premiers and representatives, at which a voluntarily increased subscription was promised by different colonies towards the naval defence of the Empire. These Colonial Conferences are not without their dangers. They are apt to register the colonial feeling of the moment rather than colonial settled opinion. But taken with the growing constitutional practice of treating self-governing colonies as members of a federation, they suggest a temporary working imperial organization by the creation of an Imperial Committee of the Privy Council, consisting of members nominated by the different colonies. Such a Committee might give advice to the Cabinet on imperial questions.[1] The future of that Committee would depend upon future constitutional practice.

The above may or may not be the immediate solution of the problem. But at present all we want is a working solution. There is danger in looking too far ahead, for we may then stumble over obstacles at our feet. Despite many blunders in the past, the British nation has shown a genius, probably never surpassed, in solving political problems in a practical manner. Difficult as the problem of Imperial Federation is, we have sufficient ground to hope that in due time even it will be finally solved.

[1] See Sir Frederick Pollock's Memorandum in the *Times* of October 17, 1904.

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